TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 224.

THE STATE OF MINNESOTA ON THE RELATION OF C. D. WHIPPLE, PLAINTIFF IN ERROR,

vs.

OSCAR MATTESON, SHERIFF OF HENNEPIN COUNTY, MINNESOTA.

TO ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

[illegible]

(27,431)

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INDEX.

	Original.	Print.
Return to writ of error	1	1
Record from district court	2	1
Notice of appeal	2	1
Order for writ of *habeas corpus*	3	2
Petition for writ of *habeas corpus*	4	2
Certified copy of minutes of conviction and sentence and warrant of commitment	8	3
Order quashing writ of *habeas corpus*	11	6
Opinion	13	7
Judgment	16	9
Petition for writ of error	17	10
Assignment of errors	21	12
Writ of error (copy)	25	14
Bond on writ of error	27	15
Citation and service	29	17
Clerk's certificate	31	18

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 8, 1920.

1 STATE OF MINNESOTA,
Supreme Court, ss:

In obedience to the command of the writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the records and proceedings in the within entitled cause, with all things concerning the same.

In Witness Whereof, I hereto subscribe my name and affix the seal of the Supreme Court of Minnesota, this 12th day of January, A. D. 1920.

[Seal of the Supreme Court, State of Minnesota.]

HERMAN MUELLER,
Clerk of the Supreme Court, State of Minnesota,
By —— ——,
Deputy.

2 STATE OF MINNESOTA,
County of Hennepin, ss:

District Court, 4th Judicial District.

STATE OF MINNESOTA ex Rel. C. D. WHIPPLE

vs.

OSCAR MARTINSON, Sheriff of Hennepin County, Minnesota.

To William M. Nash, Esq., Attorney for the above named Oscar Martinson, and to P. S. Neilson, Clerk of said District Court:

Please Take Notice, That the above named relator, C. D. Whipple, appeals to the Supreme Court of the State of Minnesota, from the order of the said District Court entered herein on the 28th day of October, A. D. 1919, quashing the writ of habeas corpus issued on the petition of the relator and from the whole thereof.

Dated this 27th day of October, A. D. 1919.

CHARLES B. ELLIOTT,
Attorney for Relator.

[Endorsed:] District Court, Fourth Judicial District, County of Hennepin. State of Minnesota ex rel. C. D. Whipple vs. Oscar Martinson, Sheriff of Hennepin County, Minnesota. Notice of appeal to Supreme Court.

3 STATE OF MINNESOTA,
County of Hennepin:

District Court, Fourth Judicial District.

Order.

On the filing of the foregoing petition and on motion of Charles B. Elliot, it is ordered that a writ of habeas corpus issue out of and under the seal of the District Court of Hennepin County, Minnesota, directed to the said Oscar Martinson, commending him to have the body of said C. D. Whipple before me in my court room in the court house in the City of Minneapolis, Hennepin County, Minnesota, at 2 o'clock P. M., October 27th, 1919, to do and receive what shall then and there be considered concerning the said C. D. Whipple together with the time and costs of his detention, and the defendant have then and there the said *rate.*

October the 27th, 1919.

JOSEPH M. MOLYNEAUX,
District Judge, Fourth Judicial District.

4 To the Honorable Jos. W. Molyneaux, Judge of the District Court, 4th Judicial District of Minnesota:

The Petition of C. D. Whipple of Minneapolis, in the County of Hennepin and State of Minnesota, respectfully shown that he is imprisoned and restrained of his liberty by Oscar Martinson, the sheriff of Hennepin County, Minnesota, in the City of Minneapolis.

That said C. D. Whipple is detained under pretended final judgment of a tribunal of criminal jurisdiction by virtue of a commitment issued upon such pretended judgment of said court, a copy of which is attached hereto.

That said judgment was rendered under an alleged statute of the State of Minnesota, viz: Chapter 260, General Laws of the State of Minnesota, 1915. That said statute is unconstitutional and void because in violation of the Constitution of the United States and in conflict with the act of Congress known as the Harrison Narcotic Law, approved December 17, 1914. That by said act the Congress of the United States, acting within its constitutional authority, assumed full and complete jurisdiction and control over the subject matter of said act to wit: the purchase, possession, care, sale and dispense of narcotic drugs such as morphine, by physicians and surgeons and others.

That this petitioner was duly licensed and authorized by competent authority under said act of Congress to do the specific act and thing for which he was convicted of doing under the aforesaid unconstitutional act of the State of Minnesota.

That the said Chapter 266, Gen. Laws of the State of Minnesota, 1915, conflicts with said act of Congress and assumes jurisdiction over matters which have been withdrawn from the control of the State of Minnesota by the act of Congress above referred to.

That said Chapter 260, General Laws of the State of Minnesota, 1915, and the whole thereof is unconstitutional and void because it is in conflict with section 1 of the Fourteenth Amendment of the Constitution of the United States, and that this petitioner under said unconstitutional law is deprived of his liberty and property without due process of law.

Your petitioner therefore prays, that a writ of Habeas Corpus may issue, directed to the said sheriff of Hennepin County, Minnesota, commanding him that he have the body of the said C. D. Whipple, by him imprisoned and detained, together with the time and cause of such imprisonment and detention, before a judge of the District Court to do and receive what shall then and there be considered concerning the said C. D. Whipple, in pursuance of the statute in such case provided.

C. D. WHIPPLE.

Dated this 27th day of October, 1919.

C. B. ELLIOTT,
Att'y for Petitioner, Minneapolis, Minnesota.

STATE OF MINNESOTA,
County of Hennepin, ss:

C. D. Whipple, the petitioner named in the foregoing petition, being duly sworn, says that he has read the foregoing petition, and known the contents thereof, that the same is true of his own knowledge, except the matters therein stated upon his information and belief, and as those matters he believes them to be true.

C. D. WHIPPLE.

Subscribed and sworn to before me this 27th day of October ,1919.
[SEAL.]
ARTHUR E. MUNSON,
Notary Public, Hennepin County, Minn.

My commission expires April 6th, 1926.

6 STATE OF MINNESOTA,
County of Hennepin, ss:

District Court, Fourth Judicial District.

No. 15367.

THE STATE OF MINNESOTA

VS.

C. D. WHIPPLE, Defendant.

Be it remembered, That at a General Term of said Court begun and holden on the 10th day of September, A. D. 1917, a Grand Jury of the County of Hennepin, in the State of Minnesota, for the aforesaid General Term of said Court (having been theretofore duly

selected, drawn and summoned) was impaneled and sworn in accordance with law. That said Grand Jury thereafter and on the 4th day of April, A. D. 1918, presented to said Court, in open Court in accordance with law, an indictment against the defendant above named, under the name of C. D. Whipple, charging him with the crime of furnishing and selling narcotic drugs to habitual users.

That said defendant, in his own proper person, was, thereafter and on the 4th day of April, A. D. 1918, duly brought before said Court, in open Court, for arraignment upon said indictment and then and there gave his true name as C. D. Whipple.

That thereafter and on the 4th day of April, A. D. 1918, the said defendant, in his own proper person, before said Court, in open Court, was duly arraigned upon said indictment and thereupon duly pleaded not guilty of said crime.

That thereafter and on the 11th day of April, A. D. 1918, (said defendant, in his own proper person, being present) a jury was duly tried, impaneled and sworn before said Court, in open Court, to try said defendant for the crime charged in said indictment.

That said cause was thereafter duly tried by said Court and
7 Jury, and that thereafter and on the 18th day of April, A. D. 1918, (said defendant, in his own proper person, being then and there) said jury did duly render in open Court the following written verdict, to-wit:

We, the jury, find the defendant, guilty as charged in the indictment.

Dated April 18th, 1918.

JOHN RAVENSCRAFT,
Foreman.

That thereafter and on the 20th day of April, A. D. 1918, said defendant in his own proper person—being before said Court, in open Court—was duly sworn and in response to questions then and there duly propounded to him, said in substance as follows, to wit: Transcript to follow.

John F. Dahl, and E. S. Cary, Esq., appearing as counsel for defendant and A. C. Finney appearing for State.

That thereafter and on the 20th day of April, A. D. 1918, said defendant, in his own proper person—being then before said Court, in open Court—was given an opportunity by said Court to say why judgment should not be rendered and sentence pronounced upon him in accordance with said verdict, but neither he nor any one for him said anything in arrest thereof.

That thereafter and on the 20th day of April, A. D. 1918, said defendant, in his own proper person—being then before said Court, in open Court—the Court, the Honorable Daniel Fish, of the City of Minneapolis, in said County and State, Judge presiding, did, in accordance with said verdict, duly adjudge said defendant guilty of said crime of furnishing and selling narcotic drugs to habitual users, and thereafter and on the 20th day of April, A. D. 1918, pronounced sentence upon said defendant, as punishment for the commission of said crime, as follows, to-wit:

It is therefore adjudged that you, Clarence D. Whipple, as punishment for the crime named in this indictment of which you have been duly convicted in this case, be confined at hard labor
8 in the State's Prison at Stillwater, Minnesota, and that in addition to that you pay a fine of five hundred dollars. In case the fine is paid within one year after the sentence begins, in that case the maximum period of confinement will be limited to one year. So the effect is that you are sentenced to the penitentiary for one year, provided you pay a fine of five hundred dollars within that year, otherwise the term will be indeterminate until you are discharged by operation of law or by competent authority.

9 STATE OF MINNESOTA,
County of Hennepin, ss:

District Court, Fourth Judicial District.

No. 15367.

THE STATE OF MINNESOTA

vs.

C. D. WHIPPLE, Defendant.

Warrant of Commitment.

The State of Minnesota to the Sheriff of the County aforesaid, and to the Warden of the State Prison of the State of Minnesota, in the City of Stillwater, in said State:

Reference being hereby made to the papers hereto attached, which are hereby made a part hereof.

Now, Therefore, in the name of the State of Minnesota, These Presents are to command you, said Sheriff, to forthwith convey and deliver into the custody of said Warden, the body of the said defendant, C. D. Whipple and to command you, said Warden, to receive the body of the said defendant, C. D. Whipple, into your custody and keeping in said State Prison and to him therein safely keep until the expiration of the term of confinement in said State Prison specified in the copy of the record of minutes of conviction and sentence hereto attached, or until he shall have been thence discharged by due course of law, or by competent authority.

Witness the Honorable Horace D. Dickinson, Judge of said District Court, and the Seal of said Court, at the City of Minneapolis, in said County and State, this 25th day of October, A. D. 1919.

P. S. NEILSON,
Clerk of District Court,
By W. W. KNIGHT, *Deputy.*

[District Court Seal.]

10 STATE OF MINNESOTA,
County of Hennepin, ss:

District Court, Fourth Judicial District.

I, P. S. Neilson, Clerk of the above named Court, do hereby certify that I have compared the papers writing to which this certificate is attached with the original copy of Record of Minutes of Conviction and Sentence, and Warrant of Commitment, in the action therein entitled, as the same appear of record and on file in the said Clerk's office, at the Court House in said Hennepin County, Minnesota, and find the same to be true and correct copies thereof, and of whole thereof.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said District Court at the City of Minneapolis, in said County this 25th day of October, A. D., 1919.

[District Court Seal.]

P. S. NEILSON,
Clerk of District Court,
By W. A. WYBERG,
Deputy.

[Endorsed:] 16721. State of Minn., County of Hennepin. District Court, Fourth Judicial District. The State of Minnesota, Plaintiff, vs. C. D. Whipple, Defendant. Filed Oct. 27, 1919. P. S. Neilson, Clerk, W. A. Ryberg, Deputy.

11 STATE OF MINNESOTA,
County of Hennepin:

District Court, Fourth Judicial District.

STATE OF MINNESOTA ex Rel. C. D. WHIPPLE

vs.

OSCAR MARTINSON, as Sheriff of Hennepin County, Minnesota.

Order.

The above entitled matter came before the undersigned one of the judges of the District Court in and for the said Fourth Judicial District at 2 o'clock on the 27th day of October, 1919, on the return to a writ of habeas corpus duly issued out of this court.

Charles B. Elliot, Esq., appeared as attorney for the relator, and Wm. M. Nash, Esq., County Attorney on behalf of the said Oscar Martinson. The matter was duly heard on the petition, files, and records and the return to the writ.

Now, after hearing the arguments of counsel and being fully advised in the premises,

It is ordered, that the said writ of habeas corpus be and the same hereby is quashed and that the said C. D. Whipple, the relator be remanded to the custody of the said Oscar Martinson as sheriff of Hennepin County.

It is further ordered, that the said Oscar Martinson, as sheriff of Hennepin County, keep and retain the said C. D. Whipple in his custody and under his control pending a hearing and determination by the Supreme Court of Minnesota of the appeal of the relator from the above order, or until further order of this court.

Dated October 28th, 1919.

JOSEPH W. MOLYNEAUX,
Judge of District Court.

12 [Endorsed:] #16721. State of Minnesota, County of Hennepin. District Court. State of Minnesota ex rel. C. D. Whipple, Relator, vs. Oscar Martinson, Defendant. Order. Filed October 28, 1918. By W. A. Ryberg, Deputy. C. B. Elliott, Relator's Attorney. O. K. Wm. M. Nash, Co. Att'y.

13 11/21/1919.

Hennepin County.

Brown, C. J.

Endorsed: Filed November 21, 1919. Herman Mueller, Clerk.

21709.

STATE ex Rel. C. D. WHIPPLE, Relator,

vs.

OSCAR MARTINSON, Sheriff of Hennepin County, Respondent.

Syllabus.

1. Chapter 260 G. L. 1915, restricting the manufacture, sale and dispensing of certain habit forming narcotic drugs, as involved in State v. Whipple, recently decided, held not in conflict with the Act of Congress known as the Harrison Narcotic Drug Act, and that the judgment of conviction therein rendered is not unlawful as violative of the paramount legislative power of the federal congress or otherwise.

Writ discharged.

Opinion.

Habeas corpus to effect the release and discharge of relator from the custody and restraint of respondent. The facts are as follows:

Relator, a practicing physician, duly licensed as such under the laws of the state, was indicted and convicted in the district court of

Hennepin county of a violation of chapter 260, General Laws, 1915, and sentenced to a term in prison. Respondent, as sheriff of the county, holds him in custody by virtue of a warrant of commitment issued on the judgment of conviction. The judgment was affirmed on appeal to this court. — Minn. —, 173 N. W. 801. Reference is here made to the opinion there rendered for a statement of the facts and the terms and provisions of the statute under which
14 the conviction was had. The particular provision of the statute, as there construed, prohibits a physician from furnishing the drug to habitual users, out of stocks kept on hand, and limits the right of the physician to furnish it to the usual prescription to be filled by a druggist. Relator furnished the drug direct from his stock, which the statute declares unlawful. Such was the basis of his conviction.

Relator contends that the paramount right of legislation upon the subject matter of the statute rests with the Federal Congress. That in the exercise of that right Congress duly enacted sections 6287 g. et. seq., U. S. Compiled Stats. 1918, being an act regulating the importation, manufacture and sale of opium and the various compounds thereof, approved December 17, 1914, known as the Harrison Narcotic Drug Act. And that the statute of this state in so far as it conflicts with the terms and provisions of the act of Congress is unconstitutional and inoperative and void. Relator further contends that the federal statute permits an act such as that here in question, which the state statute condemns, therefore, that in respect to such conflict the state statute falls and the conviction of relator thereunder becomes unlawful as violative of the paramount federal authority, entitling relator to discharge from further restraint. The validity of the act of Congress was sustained in the case of U. S. v. Doremus, 39 Sup. Ct. R. 214.

Conceding, without considering or deciding the point, which we think of doubtful merit, that the right of legislation upon the
15 subject in hand is paramount in the Federal Congress, and that the state statute is void in so far as it conflicts with the act of Congress, we are unable after careful examination and comparison of the two statutes to discover any conflict in the respect here claimed. It would serve no useful purpose to attempt to analyze the respective enactments, and we are content with announcing the conclusion stated without further comment.

The writ is therefore in all things discharged; but the commitment of relator to prison will be stayed for thirty days from the filing hereof to enable him to take such further proceedings in the premises as he may be advised. Relator may be admitted to bail during the stay upon filing a bond in the office of the clerk of the district court in the penal sums of $2,500; the sureties thereon to be approved by a judge of the district court, and the bond to be conditioned in all respects as required by law in such cases.

BROWN, *C. J.*

16 STATE OF MINNESOTA:

Supreme Court.

21700.

STATE ex Rel. C. D. WHIPPLE, Relator,

vs.

OSCAR MARTINSON, Sheriff of Hennepin County, Respondent.

Pursuant to an order of Court heretofore duly made and entered in this cause it is determined and adjudged that the writ of habeas corpus herein be and the same hereby is in all things discharged and relator remanded to the custody of Respondent.

Dated and signed December 12th, A. D. 1919.

By the Court.
Attest:

HERMAN MUELLER,
Clerk.

[Endorsed:] Supreme Court. Filed Dec. 12, 1919. H. Mueller, Clerk.

STATE OF MINNESOTA,
Supreme Court, ss:

I, Herman Mueller, Clerk of said Supreme Court, do hereby certify that the foregoing is a full and true copy of the Entry of Judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original and that the same is a correct transcript therefrom.

Witness my hand and seal of said Supreme Court at the Capitol, in the City of St. Paul, December 12th, A. D. 1919.

HERMAN MUELLER,
Clerk.
By PETER O. SCOW,
Deputy.

17 STATE OF MINNESOTA:

In Supreme Court.

STATE OF MINNESOTA ex Rel. C. D. WHIPPLE, Plaintiff-Appellant,

vs.

OSCAR MARTINSON, Sheriff of Hennepin County, Defendant-Respondent.

Petition for Writ of Error.

To the Honorable Edward D. White, Chief Justice of the United States; and to the Associate Justices of the Supreme Court of the United States:

E. D. Whipple, relator in the above entitled action, a citizen of the United States and of the State of Minnesota, shows by this petition to this honorable court that in the records, proceedings and decisions of the Supreme Court of the State of Minnesota, the same being the highest court of said State in which a decision could he had in this suit, a manifest error has occurred, greatly to the injury and damage of the petitioner, the said C. D. Whipple.

That as appears from the records and proceedings, that the petitioner, C. D. Whipple was indicted by the Grand Jury of the County of Hennepin, State of Minnesota, charged with the sale of morphine in violation of Chapter 260 of the General Laws of the State of Minnesota for the year 1915; and that said C. D. Whipple was thereafter in the District Court in and for the Fourth Judicial District, said County of Hennepin, said State, tried and convicted and sentenced to pay a fine and be imprisoned in the State prison for the period of one year; and that said conviction and sentence was thereafter on appeal duly taken affirmed by the Supreme Court of said State.

18 That thereafter on the 27th day of October, A. D. 1919, in a proceedings entitled State of Minnesota on the Relation of C. D. Whipple, Plaintiff, vs. Oscar Martinson as Sheriff of Hennepin County, Minnesota, Defendant, your petitioner secured a writ of habeas corpus from one of the judges of said district court, and upon the return thereto he contended and argued before said court that the petitioner was duly licensed and authorized to do the act complained of by the authority of the United States under the Act of Congress, approved December 17, 1914, and that Chapter 260 General Laws of the State of Minnesota for the year 1915, and particularly Section 2 thereof which petitioner was charged and convicted of violating, was unconstitutional and void because repugnant to the constitution of the United States and particularly because the said statute was repugnant to and in conflict with the act of Congress approved December 17th, 1914, known as the Harrison

Narcotic Law, whereby and by virtue of which the Congress of the United States acting within its constitutional authority, assumed full and complete jurisdiction and control over the subject matter of said act to-wit: the purchase, possession, care, sale and dispensing of the narcotic drugs, named therein including morphine by physicians and surgeons and others, the same being also the subject matter of the said statute of the State of Minnesota.

That on the return of the writ of habeas corpus the said contentions of petitioner were fully argued orally before the said District Court of Hennepin County, Minnesota, which said court
19 then decided against the right and privilege set up and claimed by said C. D. Whipple under the constitution of the United States and the laws of Congress and sustained the validity of the said statute of the said state and thereupon discharged the writ of habeas corpus and remanded petitioner to the custody of said Oscar Martinson, the sheriff of said Hennepin County, Minnesota.

That thereupon in due course and as authorized by the laws of the State of Minnesota, petitioner appealed to the Supreme Court of the State of Minnesota from the order discharging the said writ of habeas corpus; that said appeal came on for hearing before the Supreme Court in due course when your petitioner appeared and orally drew in question the validity of the said Chapter 260 of the General Laws of the State of Minnesota for the year 1915, and the authority exercised thereunder, on the ground that said statute was repugnant to the constitution and the said law of the United States. That said questions, claims and contentions were then again fully argued orally before the said Supreme Court and after being duly and formally submitted to said court were by said court on November 21, 1919, decided adversely to your petitioner's contentions and in favor of the validity of the state statute, as fully appears from the written decision thereof filed by the said court and the judgment entered thereon on the 12th day of December, 1919.

That in said proceedings in both District and Supreme Courts there was drawn in question the validity of a statute of the State of Minnesota and an authority exercised thereunder on the ground that said state statute and the authority exercised thereunder was repugnant to the constitution and laws of the United States
20 and the decision was in favor of their validity; that there was also then drawn in question the construction of Section one (1) of the Fourteenth Amendment to the Constitution. That the decision was against the rights and privileges especially set up and claimed under such clauses of the Constitution of the United States and said law of the United States, all of which fully appears in the records and proceedings of the case as specifically set forth in the assignment of error filed herewith.

Wherefore petitioner prays that a writ of error be allowed and that a transcript of record, proceedings and papers upon which said judgment was rendered duly authenticated be sent to the Supreme Court of the United States at Washington, D. C., under the rules of such court in such cases made and provided, and that the same

way be by this honorable court inspected and corrected in accor ance with law and justice.

CHARLES BURKE ELLIOTT,
Solicitor, 810 *N. Y. Life Bldg., Minneapolis, Minn.*

[Endorsed:] Supreme Court. Filed Dec. 20, 1919. H. Muelle Clerk.

21 STATE OF MINNESOTA:

In Supreme Court.

STATE OF MINNESOTA ex Rel. C. D. WHIPPLE, Plaintiff-Responden

vs.

OSCAR MARTINSON, Sheriff of Hennepin County, Defendant-Respondent.

Supreme Court of the United States.

C. D. WHIPPLE, Plaintiff in Error,

vs.

OSCAR MARTINSON, Defendant in Error.

Assignment of Errors.

Now comes C. D. Whipple, plaintiff in error, and makes an files his assignment of errors herein upon which he will rely upo his prosecution of his writ of error in the above entitled cause fro the judgment entered by the Supreme Court of Minnesota on th 12th day of December, 1919.

I.

The District Court of Minnesota erred in discharging the writ o habeas corpus and refusing to release the said C. D. Whipple fro custody and imprisonment under a commitment issued on a judg ment of conviction entered under Chapter 260 of the General La of the State of Minnesota for the year 1915.

II.

The District Court of Minnesota erred in holding and decidin that Chapter 260 General Laws of the State of Minnesota for th year 1915 is not in conflict with Section one (1) of the Fourteenth Amendment of the constitution of the United States, and is valid.

22

III.

The District Court of Minnesota erred in holding and deciding that Chapter 260 General Laws of the State of Minnesota for the year 1915 is valid and not repugnant to and in conflict with the act of Congress known as the Harrison Narcotic Law, approved December 17, 1914.

IV.

The District Court of Minnesota erred in denying to the said C. D. Whipple rights and privileges secured to him under said act of Congress known as the Harrison Narcotic Act approved, December 17th, 1914, and by Section One (1) of the Fourteenth Amendment to the Constitution of the United States.

V.

The District Court of Minnesota and the Supreme Court of Minnesota erred in holding that Congress by the said act known as the Harrison Narcotic act approved December 17th, 1914, did not take over full control and jurisdiction of the subject matter of said act and that the said act of Congress did not deprive the State of Minnesota of the right and power to legislate on said subject matter, particularly by making illegal and criminal an act authorized by the said act of Congress.

VI.

The District Court of Minnesota erred in that it decided that C. D. Whipple is not deprived of his liberty and property without due process of law in violation of Section One (1) of the Fourteenth Amendment to the Constitution of the United States.

VII.

23 The Supreme Court of Minnesota erred in that it affirmed the order of the District Court of Minnesota, discharging the writ of habeas corpus and remanding the said C. D. Whipple to the custody of Oscar Martinson, the Sheriff of Hennepin County, Minnesota.

VIII.

The Supreme Court of Minnesota erred in that it adjudged that Chapter 260 of the General Laws of the State of Minnesota for the year 1915 is valid and not repugnant to the constitution and laws of the United States.

IX.

The Supreme Court of Minnesota erred in that it adjudged that C. D. Whipple is not deprived of his liberty and property without

due process of law in violation of Section One (1) of the Fourteenth Amendment of the Constitution of the United States.

X.

The said courts of the State of Minnesota erred upon the whole record in this that upon the whole record as made up by said courts in finality and without opportunity for further review and relief therein, your petitioner has been adjudged guilty of a crime as set forth in his petition for a writ of error herein and has been sentenced to suffer penalty for such alleged crime notwithstanding that the acts alleged to have been done by your petitioner are authorized by the act of Congress and that the act under which said indictment was drawn is repugnant to the constitution and laws of the United States.

24 Wherefore, the plaintiff in error prays that said judgment of the Supreme Court of Minnesota be reversed and that said Supreme Court be ordered to enter a judgment reversing the order of the lower court on said cause.

CHARLES B. ELLIOTT,
Attorney for Plaintiff in Error.

Read on Application for Writ of Error December 20, 1919.
CALVIN L. BROWN,
Chief Justice of the Supreme Court of the State of Minnesota.

[Endorsed:] Supreme Court. Filed Dec. 20, 1919. H. Mueller, Clerk.

25 Supreme Court of the State of Minnesota.

THE STATE OF MINNESOTA ON THE RELATION OF C. D. WHIPPLE,
Plaintiff-Appellant,

vs.

OSCAR MARTINSON, Sheriff of Hennepin County, Minnesota,
Defendant-Respondent.

Writ of Error from the Supreme Court of the United States of America.

The President of the United States of America, to the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the State of Minnesota, Greeting:

Whereas in the record and proceedings and in the rendition of the judgment of the above entitled cause which is now before you, or some of you, between the State of Minnesota on the relation of C. D. Whipple, Plaintiff and Oscar Martinson, as Sheriff of Hennepin County, Minnesota, defendant, your court being the highest

court of said state having jurisdiction of the cause, there was drawn in question the validity of a statute and of an authority exercised under said state, on the ground of repugnancy to the constitution and laws of the United States and the decision was in favor of their validity; and wherein was drawn in question the construction of certain clauses of the constitution of the United States, and laws of the United States, and the decision was against the right and privilege especially set up and claimed under such clauses of said constitution and laws of the United States and wherefore there is manifest error in said decision to the damage of C. D. Whipple, the petitioner in error and whereas we are willing that if it is error it should be duly corrected, we command you therefore, if judgment be given therein, that you send under seal of your court the
26 record and proceedings in said cause to the Supreme Court of the United States together with such time as may be necessary in order that you have the same at Washington on the 19th day of January, A. D. 1920, that the record may be then inspected by the Supreme Court of the United States to be then and there held in order that justice may be done.

Witness, the Honorable Edward D. White, Chief Justice of the United States, the 20th day of December, A. D. 1919.

CHARLES L. SPENCER,
Clerk of the District Court of the United States for the District of Minnesota.

Allowed, upon C. D. Whipple, giving bond in the sum of $300.00 according to law.

CALVIN L. BROWN,
Chief Justice of the Supreme Court of the State of Minnesota.

Supreme Court, Filed Dec. 20, 1919. H. Mueller, Clerk

27 Know all men by these presents, that we, C. D. Whipple, as principal, and Thos. M. Portridge and Stewart Gamble, as sureties, are held and firmly bound unto Oscar Martinson in the full and just sum of Three Hundred ($300) Dollars which will be paid to the said Oscar Martinson, his certain attorney, executor, administrator or assigns: to which payment will and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents. Sealed with our seals and dated this 20 day of December, in the year of our Lord 1919.

Whereas, lately at a general term of the Supreme Court of the State of Minnesota in a habeas corpus proceedings pending in said court between the State of Minnesota, on the relation of C. D. Whipple, Plaintiff, and the said Oscar Martinson, Defendant, a decision and judgment was rendered against the said relator, C. D. Whipple, and the said C. D. Whipple having obtained a writ of error and filed a copy thereof in the clerk's office of the said court, to reverse the judgment in the aforesaid suit and proceedings, and a citation directed to the said Oscar Martinson citing and admonish-

ing him to be and appear at the Supreme Court of the United States, at Washington within 30 days from the date thereof.

Now, the condition of the above obligation is such, that if the said C. D. Whipple shall prosecute the said writ of error to
28 effect and answer all costs if he failed to make his plea good then the above obligation to be void; else to remain in full force and effect.

C. D. WHIPPLE.
THOS. W. PARTRIDGE.
STEWART GAMBLE.

Signed and delivered in the presence of
A. L. HERSHMAN.
C. B. ELLIOTT.

On the 20th day of December, 1919, personally appeared before me C. D. Whipple, Thos. M. Partridge and Stewart Gamble respectively known to me to be the persons described in and who duly executed the foregoing instrument, and respectively acknowledged, each for himself, that he executed the same as his free act and deed for the purposes therein set forth and the said Thos. M. Partridge and Stewart Gamble being respectively by me duly sworn says each for himself that he is a resident and free holder of the County of Hennepin and State of Minnesota and that he is worth the sum of $600.00 over and above his debts and legal liabilities and property exempt from execution.

THOS. M. PARTRIDGE.
STEWART GAMBLE.
C. D. WHIPPLE.

Subscribed and sworn to before me this 20 day of December, A. D. 1919.

A. L. HERSHMAN,
Notary Public, Hennepin County, Minn.

My Commission expires Oct. 8, 1920.

The within bond is approved both as to sufficiency and form this 20th day of December, 1919.

CALVIN L. BROWN.

Supreme Court, Filed Dec. 20, 1919. H. Mueller, Clerk.

29 [Stamped:] Received Dec. 23, 1919. Att'y General's Office, State of Minnesota.

STATE OF MINNESOTA:

In Supreme Court.

2314.

THE STATE OF MINNESOTA ex Rel. C. D. WHIPPLE, Plaintiff-Appellant,

vs.

OSCAR MARTINSON, Sheriff of Hennepin County, Minnesota, Defendant-Respondent.

UNITED STATES OF AMERICA, *ss:*

To Oscar Martinson and to his Attorney, Clifford L. Hilton, Esq., Attorney General of Minnesota, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held at the City of Washington, in the District of Columbia on the 19th day of January, A. D. 1920, pursuant to an order allowing a writ of error, and said writ, filed in the office of the Clerk of the Supreme Court of the State of Minnesota to review a final judgment of the Supreme Court of Minnesota filed and entered in the office of the Clerk of the Supreme Court of Minnesota on the 12th day of December, 1919, in that certain action and proceedings wherein the State of Minnesota ex rel. C. D. Whipple *is* plaintiff and appellant and you, the said Oscar Martinson, Sheriff of Hennepin County, *is* defendant and respondent, to show cause if any there be why the said judgment against the said appellant mentioned in the petition for said writ of error, and in said writ of error should not be corrected, and why justice should not be done to the petitioner in that behalf.

Witness the Honorable Calvin L. Brown, Chief Justice of the Supreme Court of Minnesota.

This the 20th day of December, 1919.

CALVIN L. BROWN,
Chief Justice Supreme Court of Minnesota.

(Endorsed:) Supreme Court. Filed Dec. 20, 1919. H. Mueller, Clerk.

Service of the above citation by copy admitted this the 20*st* day of December, 1919.

CLIFFORD L. HILTON,
Attorney General for Minnesota.

31 STATE OF MINNESOTA,
Supreme Court, ss:

I, Herman Mueller, Clerk of said Supreme Court, do hereby certify and return to the Honorable, the United States Circuit Court of appeals for the Eighth Circuit, that the foregoing, consisting of thirty pages, numbered consecutively from one to thirty inclusive, is a true and complete transcript of the Records, Process, Pleadings, Orders, and all other proceedings in said cause and of the whole thereof, as appears from the original files of said Court; and I do further certify and return, that I have annexed to said transcript, and included within said paging, the original citation, together with the proof of service thereof.

In Witness Whereof, I have hereunto set my hand, and affixed the seal of said Court, at St. Paul, Minnesota, this 12th day of January, A. D. 1920.

[Seal of The Supreme Court, State of Minnesota.]

HERMAN MUELLER,
Clerk.

Endorsed on cover: File No. 27,431. Minnesota Supreme Court. Term No. 224. The State of Minnesota on the relation of C. D. Whipple, plaintiff in error, vs. Oscar Martinson, Sheriff of Hennepin County, Minnesota. Filed January 17th, 1920. File No. 27,431.

MAY 7 1921
JAMES D. MAHER,
CLERK

27431.

In the Supreme Court of the United States.

October Term, 1920.

No. 224.

THE STATE OF MINNESOTA ON THE RELATION OF C. D. WHIPPLE, PLAINTIFF IN ERROR,

vs.

OSCAR MARTINSON, SHERIFF OF HENNEPIN COUNTY, MINNESOTA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

Brief of Plaintiff in Error.

THOMAS E. LATIMER,
Attorney for Plaintiff in Error,
1047 Security Building,
Minneapolis, Minnesota.

Hayward Brief Company, 313 Fourth Ave. So., Minneapolis

INDEX.

Page

Statement of the case 1

Instructions of the trial court..... 6

Decision of the Supreme Court on Appeal... 14

Decision of Supreme Court on habeas corpus 17

Argument 19

Federal laws are supreme within the scope of federal authority 24

Harrison Narcotic Act takes over the regulation of the dispensing and disposal of narcotic drugs by physicians 35

The construction of state statutes by the state court is conclusive upon the federal courts 53

The construction placed upon Section 2, Chapter 260, General Laws of Minnesota for 1915 places it in conflict with the provisions of the Harrison Act 54

The construction placed upon Section 2, Chapter 260, General Laws of Minnesota for 1915 brings it under the prohibitions of the Fourteenth Amendment to the Constitution of the United States..... 59

TABLE OF CASES.

American Waterworks v. Home Company, 115 Fed. 178 22

Allgeyer v. Louisiana, 165 U. S. 578, 589....59, 61

Bonnett v. Vallier, 136 Wis. 193, 202, 116 N. W. 885 67

Bennette v. People, 193 Ill. 334..... 65

Butchers Union Company v. Crescent City Company, 111 U. S. 746.....59, 65
Blake v. McClung, 172 U. S. 260..... 22
Blount v. United States, 255 Fed. 334..... 23
Brown v. Walker, 161 U. S. 591, 606..... 19
Brown v. Houston, 114 U. S. 622, 631..... 32
Christy v. Pridgeon, 4 Wall. 196..... 53
Chicago, etc., R. R. Company v. Chicago, 166 U. S. 235 62
Connolly v. Sewer Pipe Company, 184 U. S. 540 .....22, 32
Commonwealth v. Beaulieu, 213 Mass. 138, 99 N. E. 555 65
Cooley on Const. Limitation, 6th Edition, 606, 607, 744 68
Dunne v. People, 94 Ill. 120..... 67
Ex Parte Yarbrough, 110 U. S. 658.....19, 30
Ex Parte Virginia, 100 U. S. 339, 346..... 61
Ex Parte Whitwell, 98 Cal. 73, 32 Pac. 872.... 69
Forsythe v. Hammond, 166 U. S. 506, 518..... 53
Fyke v. United States, 254 Fed. 225..... 20
Foreman v. United States, 255 Fed. 621, 624.. 49
Flint v. Stone Tracy Co., 220 U. S. 107, 147, 153, 156 40
Frorer v. People, 141 Ill. 171, 31 N. E. 395.... 69
Gibbons v. Ogden, 9 Wheat 1, 211.....28, 63
Gatewood v. North Carolina, 203 U. S. 531.... 54
Gulf, etc., R. R. Company v. Hefley, 158 U. S. 98, 103 .....34, 63
Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 215 34
Henderson v. New York, 92 U. S. 59..... 29

Hennington v. Georgia, 163 U. S. 299, 317.... 64
Houston v. Moore, 5 Wheat 1, 49.....27, 28
Hughes v. United States, 253 Fed. 543..... 23
Hodgson v. Vermont, 168 U. S. 272..... 62
In re Debs, 158 U. S. 564..... 19
In matter of Jacobs, 98 N. Y. 98, 108..... 66
Illinois Railway Co. v. Doherty, 47 L. R. A., U. S. 31 20
In re Kollock, 165 U. S. 526, 536..... 40
Louisiana v. Pilsbury, 106 U. S. 278, 294..... 54
Lochner v. New York, 98 U. S. 60..... 64
Lawton v. Steele, 152 U. S. 133, 136..... 60
Louisville & Nashville Railroad Co. v. State, 76 Southern 507 22
License Tax Cases, 5 Wall. 462, 471..... 40
McCray v. United States, 195 U. S. 27..... 40
Morgan Steamship Co. v. Louisiana, 118 U. S. 455 31
McCulloch v. Maryland, 4 Wheat. 336, 405, 406, 436 ..... 25 26
Missouri & Kansas Railway Co. v. Haber, 169 U. S. 613, 626 64
Mobile v. Kimball, 102 U. S. 691, 697..... 32
Mondon v. New York, N. H. & R. Co., 223 U. S. 1. 33
Melanson v. United States, 256 Fed. 783..... 51
McPherson v. Secretary of State, 16 L. R. A. 475 20
Northern Pacific Railway v. Washington, 222 U. S. 370 34
Northern Securities Co. v. United States, 193 U. S. 197, 347 19

Nashville C. & S. L. Railway v. Taylor, 86 Fed. 168, 184 61
Nashville Railway v. Alabama, 128 U. S. 96, 99 34
Neal v. Delaware, 103 U. S 370, 397 61
New York, New Haven & Hudson Ry Co. v. New York, 165 U. S. 628, 631 64
New Orleans Gas Company v. Louisiana Light Company, 115 U. S. 650, 661 31
Pennsylvania v. Wheeling, etc. Bridge Co. 13 Howard 518, 566 19
Prigg v. Commonwealth of Pennsylvania, 16 Pet. 617 29
People v. Gillison, 109 N. Y. 389 68
Pickard v. Pullman Southern Car Co., 117 U. S. 34 32
Reid v. Colorado, 187 U. S. 137, 150.....34, 63
Rasmussen v. Idaho, 181 U. S. 198, 200..... 64
Reeves v. United States, 263 U. S. 691..... 52
Robbins v. Shelby Taxing District, 140 U. S. 489 32
Railroad Co. v. Husen, 95 U. S. 465, 469..... 33
Ruhtrat v. People, 185 Ill. 133; 57 N. E. 41.... 69
Simot v. Davenport, 22 Howard 227 20
Shelby v. Guy, 11 Wheat, 361 21
Sherlock v. Alling, 93 U. S. 99..... 34
Smith v. Alabama, 124 U. S. 465, 473, 480, 482.. 34
State v. Peel Splint Coal Co., 36 W. Va. 802... 65
Saunders v. United States, 260 Fed. 387..... 46
Southern Ry. Co. v. Reid, 222 U. S. 424..... 34
State Freight Tax Cases, 15 Wall. 232, 279... 32
State v. City of Sheridan, 170 Pac. 3, 4 65
Sims v. United States, 8 C. C. A. 1920, 268 Fed.

234 23
Scott v. McNeal, 154 U. S. 34 61
State, ex rel. v. Martinson, 174 N. W. 823..... 18
Taylor v. Beckham, 178 U. S. 610 22
Taylor v. Thomas, 22 Wall. 479 22
Thurston v. United States, 241 Fed. 335 (C. C. A. 5 Ct. 1917) 23
The Lottawanna, 21 Wall. 558, 581 34
Trader v. United States, 260 Fed. 923 48
Tolliver v. Blizzard, 143 Ky. 773, 137 S. W. 509. 65
Tiedman, Limitation of Police Power, 3 68
Thompson v. United States, 258 Fed. 196 .. 45, 48
Town of Lake View v. Rose Hill Cemetery, 70 Ill. 191 69
United States v. Doremus, 249 U. S. 86 36
United States v. Fleming (D. C.) 251 Fed. 932. 49
United States v. Friedman, 224 Fed. 276..... 47
United States v. Jin Fuey Moy, 225 Fed. 1003; 253 Fed. 213, 241, U. S. 394, 36 Sup. Ct. 658. 41
United States v. Reynolds (D. C.) 244 Fed. 991. 21
United States v. Rosenberg, 251 Fed. 963..... 20
Virginia v. Rives, 100 U. S. 313, 318..... 61
Veazie Bank v. Fenno, 8 Wall. 533, 541..... 40
Weaver v. Fayley, 29 Pa. St. 27 20
Webb v. United States, 249 U. S. 96..... 42
Wilson v. Blackbird Creek Marsh Co., 2 Pet. 245, 51, 52 19
Workin v. United States, 260 Fed. 137 23
Wabash Ry Co. v. Illinois, 118 U. S. 557..... 32
Walling v. Michigan, 116 U. S. 446, 455..... 32
Welton v. Missouri, 91 U. S. 275, 282 32

27431.

In the Supreme Court of the United States.

October Term, 1920.

No. 224.

THE STATE OF MINNESOTA ON THE RELATION OF C. D. WHIPPLE, PLAINTIFF IN ERROR,

vs.

OSCAR MARTINSON, SHERIFF OF HENNEPIN COUNTY, MINNESOTA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

Brief of Plaintiff in Error.

STATEMENT OF THE CASE.

Plaintiff in error, Dr. C. D. Whipple, hereinafter called the defendant, was indicted under Section 2 of Chapter 260, General Laws of Minnesota for 1915, being "an act to provide against the evils resulting from the traffic of certain habit-forming narcotic drugs and to regulate the sale and the having in possession of such drugs, and repealing all acts or parts of acts inconsistent herewith and providing penalties for violation thereof."

The indictment reads as follows:

"C. D. Whipple is accused by the Grand Jury of the county of Hennepin, in the state of Minnesota, by this indictment, of the crime of furnishing and selling narcotic drugs to habitual users committed as follows:

The said C. D. Whipple on or about the 21st day of January, A. D., 1918, at the city of Minneapolis, in said Hennepin county, Minnesota, then and there being, did wilfully, unlawfully, wrongfully, and feloniously sell and furnish to one Frank Chandler, for his personal use, he, the said Frank Chandler, being then and there and for a long time prior thereto an habitual user of the same, a certain narcotic, to-wit: six grains of morphine, he, the said C. D. Whipple, then and there being a licensed physician, but that said narcotic was not so furnished, sold and prescribed in good faith by the said C. D. Whipple for the treatment of such aforesaid habit of the said Frank Chandler, contrary to the statute in such case made and provided, and against the peace and dignity of the state of Minnesota.

Dated at the city of Minneapolis, in said Hennepin county, this 3rd day of April, A. D., 1918.

Geo. K. Belden,
Foreman of the Grand Jury."

This law makes it unlawful for any person to possess, sell or otherwise dispose of, any morphine or cocaine, and so forth, but makes certain provisos for the handling of the drug by druggists and physicians.

Section 2 of the act makes provision for the treatment of habitual users of these drugs by physicians as follows:

"Section 2. It shall be unlawful for any physician or dentist to furnish to or prescribe, for the use of any habitual user of the same, any of the substances enumerated in section 1 of this act; provided that the provisions of this section shall not be construed to prevent any legally licensed physician from prescribing in good faith, for the use of any patient under his care, for the treatment of a drug habit, such substances as he may deem necessary for such treatment; provided that such prescriptions are given in good faith for the treatment of such habit."

To support this charge, the State introduced at the trial the testimony of Frank Chandler, a drug addict, who testified that on the 21st day of January, 1918, the date alleged in the indictment, he secured from the defendant six grains of morphine; that this transaction took place at defendant's home; Chandler was arrested on his coming out of defendant's residence and two police officers took from his person two packages, the contents of which were subsequently analyzed by a chemist and found to contain morphine and cocaine.

Chandler testified, also, to other transactions of a similar nature with the defendant at his office during the course of several months prior to the date of the offense charged.

Other witnesses including the State's main witness Chandler, the witness Algren, and Carl B. Enquist admitted substantially that the drugs were furnished in ever-decreasing quantities and in the course of treatment they were taking from the de-

fendant for the cure of the habit by the so-called gradual reduction treatment.

The defendant is a licensed physician and has practiced his profession in the city of Minneapolis for fifteen years. He was educated at Gustavus-Adolphus College, St. Peter, the University of Minnesota and the Illinois School of Electro-Therapeutics. In 1913 he made a special study of the treatment of drug addicts in Europe, and particularly, the gradual reduction method, which consists in reducing the patient so gradually that the discomfort and pain incident to the withdrawal of the drug will not be such as to discourage and prevent him from continuing the treatment, sudden withdrawal of the drug causing intense pain and suffering. This gradual reduction is continued to a point where the patient is taking only a grain or one-half a grain a day, when a serum manufactured by the defendant and a part of the cure as studied and learned abroad is used, the action of the serum neutralizing the toxins in the blood and destroying and relieving the craving for the drug.

During the year 1917 he treated, or began to treat, by this method several of the witnesses called by the State and, among them, the witness Frank Chandler, all of whom were and had been for several years drug addicts.

In his first interview with Chandler on September 12th, 1917, he examined the patient, who in general appearance presented the aspect of an affirmed addict, very anemic, pale and ash-colored

skin, eyes of a glassy stare, nervous, weak, cold perspiration of face, forehead and body, heart action rapid, breathing shallow, his arms discolored, the effect of the use of the hypodermic needle. The patient informed him that he had been using, and was using at the time, thirty grains of morphine a day. The defendant began his treatment by prescribing twenty-three grains per day. From that time on, the defendant treated him until sometime in January, 1918, by the gradual reduction method.

On January 21st, 1918, the date of the alleged offense, Chandler came to defendant's home and defendant prescribed for him six grains of morphine, to which quantity by that time he had been gradually reduced. Defendant was paid two dollars ($2.00) a visit by Chandler during the treatment, except on some occasions when he was paid one dollar ($1.00) and sometimes nothing at all since he had no money.

As to the other drug addicts called by the State, defendant testified that he had treated them, with the exception of two with whom he denied having had any transactions, by the gradual reduction method, in the course of which treatments he had prescribed morphine and cocaine in gradually diminished quantities. In each case the defendant had kept a record of the quantities prescribed for them, a record required by the Federal law and to which federal inspectors had access, and which records were inspected by them, and in each case where the drug was prescribed and also furnished to the patient it was put up in containers which

were stamped with the words, "Poison, dissolve contents in an ounce of water and take as directed," and the name and address of the patient.

Defendant denied that the packages produced in court were ever given or furnished by the defendant to Chandler, that they did not contain the stamp which he always placed upon the containers of these drugs when furnished to the patient as a part of the prescription.

The attorneys for the defense and for the prosecution went into this case upon the theory that the question of the good faith of the defendant was the important question at issue, and this appeared also to be the attitude of the court during the early period of the trial, but after the State rested the trial judge stated in open court his theory of the law to be that the question of good faith could not be raised by the defendant, thus interpreting the law to be that the physician by treating the addict violated the law regardless of the purpose for which the drug was given. At the close of the trial, during the latter part of which all rulings upon the admission of evidence were based upon this theory, the court instructed the jury repeating his former instructions, which he had read to counsel in the midst of the trial of the case.

The instructions of the trial court upon this particular phase of the case was as follows:

> "It is for the court to say what the law is and for the jury to act on the instructions of the court in that respect. Because of the importance of this case, and of the fact that

the controversy is so largely dependent upon the proper interpretation of this act I announced in the course of the trial to counsel the view which seemed to me to be the proper view of the act in question in order that counsel on both sides might be prepared to shape their course accordingly, and to call the attention of the court to any reasons which might occur to them as to whether the interpretation suggested was the proper one or not. And for greater safety and convenience in that respect I had those instructions transcribed and announced that I should, unless otherwise persuaded as to the correctness of that view, give it in the charge to the jury.

Now, inasmuch as this act is so very important and inasmuch as the defendant has very evidently misapprehended and misunderstood the terms and purposes of the act, and inasmuch as the jury in a case of this kind is an integral part of the court, I think it proper to take considerable pains to make clear to the jury the view which the court entertains as to the scope and intent and effect of this legislation.

We come now to section 2 of the act which has to do with this traffic in relation to those unfortunates who have become victims of these alluring narcotics. Like section 1 it begins with a broad prohibition, which reads as follows: 'It shall be unlawful for any physician or dentist to furnish or prescribe for the use of any habitual user of the same any of the substances enumerated in section 1 of this act.' Now if that were all of this section the prohibition, of course, would be absolute, so that a physician could not lawfully under any conditions either furnish morphine or the like to any habitual user, or give a prescription therefor such as pharmacists are required to have

before they can lawfully furnish it. I do not recite the very specific restrictions that are laid upon druggists and pharmacists by this act in respect to the filling of such prescriptions which are found in subdivision 'g' of section 1, except to say that the prescription must be in writing, that is, the prescription where the drug is dispensed not to habitual users but to the ordinary patient—that it must be in writing signed by one authorized to prescribe and dated on the day it was signed. And that no such prescription can be filled a second time, for each sale there must be a new prescription.

Now that regulation as I have indicated relates not to the sale to habitual users, but to such prescriptions and dispensing as physicians are permitted to make by this act in dealing with other classes of patients.

But the prohibition I have quoted from section 2 is not wholly unqualified. Instead of many modifications, however, as in the case of section 1, there is but a single modification, one departure from the initial prohibition, and it applies to physicians only, excluding dentists. And this is the proviso: 'Provided that the provisions of this section shall not be construed to prevent any legally licensed physician from prescribing in good faith for the use of any patient under his care for the treatment of the drug habit such substances as he may deem necessary for such treatment.' That is, if the physician has under his care a patient, treating him for the habit—for the cure of the habit, he may notwithstanding this prohibition prescribe for the patient such substances as he may deem necessary for such treatment, provided that such prescriptions are given in good faith for the treatment of such habit.

And it is that particular proviso, I take it,

under which the defendant—upon which the defendant has relied in this case as a protection of the course of practice which he has followed. You will notice, gentlemen, that the prohibition without the proviso covers both the furnishing and prescribing for the use of an habitual user, while the qualification, covers only the prescribing of such drug for his use. Read literally, therefore, the entire section plainly forbids any physician to furnish the drug to a patient who is an habitual user even though the patient be under his treatment for the cure of the habit. He may prescribe the drug if in good faith he deems it necessary for the cure of the habit, and very likely he may lawfully in an emergency or while the patient is under control administer it in person or by an assistant, if in good faith he deems it necessary as a measure of cure. But surely this section does not warrant a physician in placing the drug in the patient's hands and permitting him to carry it away and enabling him to use it under no other restraint than the self control of the patient of this class whose will power has been broken down under the very habit sought to be cured.

There is a very obvious reason, it seems to me, gentlemen, for holding that this section means just what it says. The purpose of the act being to guard against the evils resulting from the traffic in such drugs it could not escape the legislative notice that the traffic conducted by physicians and surgeons and dentists would be as dangerous as the traffic conducted by anyone else, that is, that it might be. In permitting physicians acting in good faith to prescribe such drugs in a *bona fide* effort to correct the habit, which it was thought in some cases to be necessary, the

legislature deemed it advisable also to protect the conscientious physician; to put him in a position where he might prescribe the remedy if he deemed it necessary without subjecting himself to injurious consequences or suspicions, and to remove from him all temptation to recommend these dangerous drugs because of the profit that he might reap from the sale of them. So the statute leaves him free to prescribe morphine or cocaine if in his opinion necessary for the cure of the morphine or cocaine habit, and at the same time forbids him to engage as a dealer in such merchandise. A physician may issue his prescription for such amount of the drug as he deems safe or beneficial to the patient either separately or in combination with other substances, and this will authorize a pharmacist to make one sale and delivery to the patient, and no more. If more is needed another prescription may issue, and so on, until the habit is eradicated or the hoped for cure is abandoned.

To hold that under this statute a physician may both prescribe or recommend the drug, and supply it out of his stock, would be placing fewer restrictions upon the traffic with habitual users than upon traffic with ordinary patients not addicted to the drug habit.

* * * * * * * *

You are therefore instructed, gentlemen of the jury, that physicians are not permitted by law as and to sell or furnish to habitual users out of stocks kept on hand for any purpose these habit forming drugs. All sales and deliveries of such substances as are enumerated in this act to victims of the habit whether for the purpose of curing the habit or any other object must be made, if made at all, by a pharmacist or druggist, and by them

only upon a physician's prescription under the safeguards imposed by law in respect to such sales.

That leaves for your consideration, gentlemen, only the question of whether the defendant furnished the morphine charged in this indictment. It is quite immaterial whether the furnishing is in the form of a sale or not, or whether it is paid for or not. The prohibition is against the furnishing or in any way disposing of the drug to habitual users. 'It shall be unlawful for any physician or dentist to furnish to or prescribe for the use of to any habitual user of the drug any of the substances mentioned in section 1.' The other prohibtion is that it shall be unlawful for any person to possess or sell, or otherwise dispose of—it may neither be sold nor given away, nor supplied in any form, if this statute means what it says.

If, therefore, gentlemen, you should find from the evidence in this case, beyond a reasonable doubt, that the defendant C. D. Whipple was on or about January 21st, 1918, a duly licensed physician and surgeon, that on or about that date he did sell, deliver, or otherwise furnish to Frank Chandler within this county, six grains or thereabouts, of morphine for the personal use of said Chandler, and if you further find beyond a reasonable doubt that Chandler was at the time an habitual user of morphine, addicted to its use, then such sale was a violation of the law, and the defendant should be found guilty as charged in the indictment.

I am not aware that any question was made about any of these essential facts unless it be possibly the fact of the furnishing of this particular six grains of morphine at the defendant's house on that 21st day of January. You

will consider what the evidence disclosed as to that fact, whether there is anything that raises a doubt about that. Whether the fact of the arrest of the man Chandler near the house and finding of the contents of this Exhibit A that has been introduced in evidence, the two packages, the testimony as to what the packages contained, the statements which the defendant himself has made concerning that transaction—whether upon the whole there is any uncertainty such as amounts to a reasonable doubt that that particular quantity of morphine was at that time furnished. If you so find, I charge you, gentlemen, that the fact, if it be a fact, whether it is a fact or not, that the defendant in furnishing it was in good faith attempting to cure the man of the drug habit is not a defense. If that be true it does not meet the requirements of the defense in this case because while a doctor may be permitted to prescribe the drug, there is a marked difference between the term prescribe and the term dispense. One is to give directions for and to apply a formula. The other is to deal with the article. The statute does not permit a physician who has prescribed even though in good faith for the cure of the habit where he is dealing with a drug addict to furnish the article, to furnish the goods in the way in which the evidence here discloses it was furnished, if at all. Where a law is a new one and subject to misunderstanding, and misinterpretation, that is not a defense against a violation of the act. It is a matter which may properly be taken into consideration in determining what penalty should be imposed. But the questions of fact in the case are the only questions with which the jury are concerned. The jury must determine the facts and the court must take

the responsibility for the proper interpretation of the law. If the court errs in the instructions a way is provided for the correction of that error and for its correction before any punishment is administered, that is any penalty provided by the act. Of course, in no case can the law undertake to guard against the inconvenience which may result upon the conviction for a crime unwittingly committed. But a crime cannot be defended on the ground that the accused did not know or misapprehend what the law was, because of the legal presumption that all of us must know what the law is. There is no other way in which the law could be administered impartially. Ignorance of the law does not excuse. So that even though you are satisfied, and as to that you are not concerned, even though you are satisfied that this was innocently done, that it was done in good faith, that fact does not amount to a defense, if the other facts to which I have called your attention are found true. Swear an officer.

The jury retired at 3:30 P. M., April 17th, 1918, and returned into court for further instructions at 11:30 A. M., April 18th, 1918, when the foreman handed to the court the following written communication:

'Your Honor: There seems to be a misunderstanding in the minds of some of the jurors in regard to the court's ruling relative to that part of the indictment which reads "not in good faith."

Are the jurors to take this feature of the indictment into consideration?

John Ravenscroft,
Foreman.

The Court: In answer to the suggestions contained in this paper the contents of which will be entered in the record and the document

itself filed in the case, I may say that upon the question of good faith I instructed the jury in the original charge that in this class of cases the question of whether this particular drug was administered or furnished in good faith or not is immaterial in this case, for the reason that the statute forbids a physician to give or furnish or otherwise dispose of this class of drugs to habitual users. That is the object of the statute to prevent that practice."

The jury returned a verdict of guilty.

An appeal was taken to the Supreme Court of the State of Minnesota, and that Court, in affirming the interpretation placed upon the statute by the trial court, said:

"The court instructed the jury that, under this statute, 'physicians are not permitted by law to sell or furnish to habitual users, out of stocks kept on hand for any purpose, these habit-forming drugs,' that 'all sales and deliveries of such substances * * * to victims of the habit, whether for the purpose of curing the habit or any other object, must be made, if at all, by a pharmacist or druggist and by them only upon a physician's prescription, under the safeguards imposed by law in respect to such sales,' that 'the question whether this particular drug was administered or furnished in good faith or not is immaterial,' that 'the statute makes a distinction between the disposal, prescription and furnishing of these drugs to habitual users and to ordinary patients. * * * In the case of patients not addicted, a physician is permitted in the usual course of his practice to prescribe them and also to furnish them. As regards habitual users the statute first

prohibits anybody from either furnishing or prescribing the drug to that class of people. But that is qualified by the permission, in the case of a doctor, who in good faith having an addict under treatment for the cure of the habit, to give him a prescription upon which he can procure the drug. He is forbidden, however, by this statute to furnish the drug himself.' Defendant questions these instructions. He claims that under section 2 a physician may both prescribe and furnish the drug to an addict if done in good faith and for purposes of treatment. The question of the correctness of this construction of the statute is the crucial question in the case.

We think the court correctly construed the statute. There is a plain difference between 'prescribe' and 'furnish.' To 'prescribe' is to give medical direction, to indicate remedies. To 'furnish' is to supply or provide. This is the ordinary meaning of these terms. Both words are used, obviously with this distinction as to meaning, in the Federal Anti-Narcotic Law, act of March 3, 1915, c. 74, 38 Statutes at Large, 817 (U. S. Comp. St. #7696b-7696n). The context makes plain the intention to so use the words in our statute. In section 1, the word 'prescription' is used repeatedly in the sense mentioned and with accurate direction as to the manner in which the prescription may be filled by a pharmacist. It is quite clear that the word 'prescribe' was used in the same sense in section 2, and when that section first made it unlawful for a physician to 'furnish to or prescribe for' the habitual user the drug mentioned, and then provided that he might 'prescribe' in good faith 'for the use of' such habitual user, it used the term 'prescribe' in ordinary sense, and it is used in that sense throughout the act. If we

need look for the reason, it is doubtless found in the purpose to require two persons to be concerned in the supplying of narcotic drugs to addicts under the conditions as to publicity which the statute requires in case of prescriptions. In view of the strict requirements of section 1, as to the record to be kept by a physician administering the drug to a patient not an addict, it is quite inconceivable that the legislature should have intended that a physician may furnish the drug to an addict without any safeguard or provision for record at all."

143 Minn. 403; 173 N. W. 802.

A petition for a rehearing was denied.

When it became apparent that the law as interpreted by the trial court and sustained by the highest appellate court of the state was different from the law as understood by counsel on both sides before the trial of this case, counsel then raised the question of the validity of this act as thus interpreted urging that it was void as being in conflict with and repugnant to the act of congress known as the Harrison Narcotic Act, approved Dec. 17, 1914, and in conflict with the provisions of section one of the Fourteenth Amendment of the Constitution of the United States. This question was raised by a writ of *habeas corpus* sued out in the District Court of Hennepin county, which writ was discharged, and the said order of discharge was appealed to the Supreme Court of the State of Minnesota, the court of final appellate jurisdiction within said state and said Supreme Court of the State of Minnesota affirmed the

the responsibility for the proper interpretation of the law. If the court errs in the instructions a way is provided for the correction of that error and for its correction before any punishment is administered, that is any penalty provided by the act. Of course, in no case can the law undertake to guard against the inconvenience which may result upon the conviction for a crime unwittingly committed. But a crime cannot be defended on the ground that the accused did not know or misapprehend what the law was, because of the legal presumption that all of us must know what the law is. There is no other way in which the law could be administered impartially. Ignorance of the law does not excuse. So that even though you are satisfied, and as to that you are not concerned, even though you are satisfied that this was innocently done, that it was done in good faith, that fact does not amount to a defense, if the other facts to which I have called your attention are found true. Swear an officer.

The jury retired at 3:30 P. M., April 17th, 1918, and returned into court for further instructions at 11:30 A. M., April 18th, 1918, when the foreman handed to the court the following written communication:

'Your Honor: There seems to be a misunderstanding in the minds of some of the jurors in regard to the court's ruling relative to that part of the indictment which reads "not in good faith."

Are the jurors to take this feature of the indictment into consideration?

John Ravenscroft,
Foreman.

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order discharging the writ. Chief Justice Brown of said court giving the opinion as follows:

> "Relator, a practicing physician, duly licensed as such under the laws of the state, was indicted and convicted in the District Court of Hennepin county of a violation of chapter 260, General Laws, 1915 (Gen. St. Supp. 1917, §§8965-1 to 8965-5), and sentenced to a term in prison. Respondent, as sheriff of the county, holds him in custody by virtue of a warrant of commitment issued on the judgment of conviction. The judgment was affirmed on appeal to this court. 173 N. W. 801. Reference is here made to the opinion there rendered for a statement of the facts and the terms and provisions of the statute under which the conviction was had. The particular provision of the statute, as there construed, prohibits a physician from furnishing the drug to habitual users out of stocks kept on hand, and limits the right of the physician to furnish it to the usual prescription to be filled by a druggist. Relator furnished the drug direct from his stock, which the statute declares unlawful. Such was the basis of his conviction.
>
> Relator contends that the paramount right of legislation upon the subject-matter of the statute rests with the federal congress, that in the exercise of that right congress duly enacted section 6287g *et seq.*, U. S. Compiled Stats., being an act regulating the importation, manufacture, and sale of opium and the various compounds thereof, approved December 17, 1914 (38 Stat. 785, c. 1), known as the Harrison Anti-Narcotic Drug Act, and that the statute of this state in so far as it conflicts with the terms and provisions of the act of congress is unconstitutional and inoperative and void. Relator further contends that the

federal statute permits an act such as that here in question which the state statute condemns; therefore that in respect to such conflict the state statute falls, and the conviction of relator thereunder becomes unlawful as violative of the paramount federal authority, entitling relator to discharge from further restraint. The validity of the act of congress was sustained in the case of *United States v. Darrmus*, 249 U. S. 86, 39 Sup. Ct. 214, 63 L. Ed. 493.

Conceding, without considering or deciding the point, which we think of doubtful merit, that the right of legislation upon the subject in hand is paramount in the federal congress, and that the state statute is void in so far as it conflicts with the act of congress, we are unable after careful examination and comparison of the two statutes to discover any conflict in the respect here claimed. It would serve no useful purpose to attempt to analyze the respective enactments, and we are content with announcing the conclusions stated without further comment.

The writ is therefore in all things discharged; but the commitment of relator to prison will be stayed for 30 days from the filing hereof to enable him to take such further proceedings in the premises as he may be advised."

144 Minn. 206; 174 N. W. 823.

Section 2 of said Chapter 260 of Laws 1915 was amended April 10th, 1919, and words "furnish to" used wherever words "prescribe for" were used.

ARGUMENT.

I.

It is the established doctrine that in every case where there are acts of congress passed pursuant to the provision of the federal constitution, they are the supreme law and the state laws, and the authority exercised thereunder, although touching matters within the reserved powers of the states, must yield thereto.

Article VI, sec. 2, Constitution of the United States.

Wilson v. Black-Bird Creek Marsh Co., 2 Pet. 245, 51, 52.

Houston v. Moore, 5 Wheat. 1, 49.

Henderson, et al. v. Mayor of New York, 92 U. S. 272.

McCullough v. Maryland, 4 Wheat. 316, 405, 6, 36.

Ex Parte Yarbrough, 110 U. S. 658.

In re *Debs*, 158 U. S. 564.

Reid v. United States, 187 U. S. 146.

Northern Securities Co. v. U. S., 193 U. S. 197, 347.

Gulf, Colorado, etc., Railway v. Hefley, 158 U. S. 98.

Gibbons v. Ogden, 9 Wheat. 1, 211.

Prigg v. Commonwealth of Pa., 16 Pet. 617.

Brown v. Walker, 161 United States 591, 606.

Pa. v. Wheeling etc. Bridge Co., 13 How. 516, 566.

Illinois Railway Co. v. Doherty, 47 L. R. A. N. S. 31.

McPherson v. Secretary of State, 16 L. R. A. 475.

Mondon v. New York, N. H. and H. R. Co., 223 U. S. 1.

Simot v. Davenport, 22 How. 227.

Weaver v. Fagley, 29 Pa. St. 27.

II.

The federal congress by the passage of the Harrison Narcotic Drug Act, which has been upheld as constitutional, has assumed among other matters the authority for the regulation of the dispensing and prescription of drugs to addicts and others by physicians.

United States v. Doremus, 39 Sup. Ct. R. 214, 249 U. S. 86.

Webb v. United States, 249 U. S. 96.

Hughes v. United States, 253, Fed. 543.

United States v. Fleming, 251 Fed. 932.

U. S. v. Jin Fuey Moy, 253 Fed. 543.

Foreman v. U. S., 255 Fed. 621

Fyke v. U. S., 254 Fed. 225.

Saunders v. U. S., 260 Fed. 387.

Trader v. U. S., 260 Fed. 924.

Thompson v. U. S., 258 Fed. 196.

U. S. v. Rosenberg, 251 Fed. 963.

U. S. v. Friedman, 224 Fed. 276; 260 Fed. 389.

Melanson v. U. S., 256 Fed. 787.

Reeves v. U. S., 263 Fed. 691.

III.

The construction placed upon any state statute by the highest court of that state is deemed to be conclusive upon the Federal Courts.

Forsyth v. Hammond, 166 U. S. 506, 519.
Louisiana v. Pilsbury, 105 U. S. 278, 294.
Christy v. Pridgeon, 4 Wall. 196.
Shelby v. Guy, 11 Wheat. 361.
Gatewood v. North Carolina, 203 U. S. 531.

IV.

The construction placed upon Section 2 of Chapter 260 of the General Laws of Minnesota for 1915 by the highest court of the state is such as to place that provision of the state law in conflict with and repugnant to the provisions of the act of congress known as the Harrison Narcotic Law, approved Dec. 17th, 1914.

United States v. Friedman, 224 Federal 276.
United States v. Fleming (D. C.) 251 Federal 932.
United States v. Reynolds (D. C.) 244 Federal 991.

V.

The prohibitions of the 14th amendment to the Constitution of the United States applies to legislative and judicial acts of a state hostile in their purpose to the authority of the United States gov-

ernment, or which impairs the rights of citizens under the Constitution of the United States.

Taylor v. Thomas, 22 Wall. 479.

Butchers Union Company v. Crescent City Company, 111 U. S. 746.

Scott v. McNeal, 154 U. S. 34.

Allgeyer v. Louisiana, 165 U. S. 578.

C. B. & Q. Ry. v. Chicago, 166 U. S. 234.

Hodgson v. Vermont, 168 U. S. 272.

Blake v. McClung, 172 U. S. 260.

Taylor v. Beckham, 178 U. S. 610.

Connolly v. Union Sewer Pipe Co., 184 U. S. 540.

Nashville R. R. v. Taylor, 86 Fed. 184.

State v. City of Sheridan, 170 Pac. 3.

American Waterworks v. Home Co., 115 Fed. 178.

State v. Peel Splint Coal Company, 36 W. Va. 856.

Ind. Gas Co. v. State, 158 Ind. 522; 57 L. R. A. 763.

Chenoweth v. State Board, 141 Pac. 134.

Louisville & Nashville R. R. Co. v. State, 76 Southern 507.

VI.

A physician, in order to bring himself under paragraph "A" of section 2 of the Harrison Narcotic Act, which establishes an exception to the general provisions of said act, must, first, register under the act; second, dispense drugs to none but pa-

tients under medical or professional treatment, and third, prepare and keep a record of drugs dispensed as therein provided and preserve the same for a period of two years.

If these provisions are complied with, the physician has shown his desire to comply with the provisions of the law and his good faith in the dispensing of drugs.

In practically every jurisdiction, the Federal Courts have stressed and made the deciding factor in cases against physicians the question of the "good faith" of the physician. Did he dispense the drug to a *bona fide* patient in the course of professional treatment?

United States v. Fleming, 251 Fed. 932 (D. C. W. Pa. 1918).

Sims v. United States, 8 C. C. A. 1920, 268 Fed. 234.

United States v. Charter (D. C. N. O. 1915) 227 Fed. 331.

Jin Tuey Moy v. United States, 41 Sup. Ct. 98; 225 Fed. 1003, 253 Fed. 213.

Workin v. United States, 260 Fed. 137 (2 C. C. A. 1919).

Hughes v. United States, 253 Fed. 543 (C. C. A. 8 Ct. 1918).

Thurston v. United States, 241 Fed. 335 (C. C. A. 5 Ct. 1917).

Bount v. United States (C. C. A. 7 Ct. 1918) 255 Fed. 334.

I.

Article VI, section 2, of the Constitution of the United States provides:

> "This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

The conflict of authority between the federal and state officials soon reached the courts for interpretation of the provisions of the United States Constitution as to the respective powers of congress and the state legislatures. Each side to the controversy had able supporters. Those favoring a strong federal state placed emphasis upon the implied powers of congress, while those supporting the state's rights placed emphasis upon the police power of the states. A most careful analysis of the United States Constitution as affecting the power of congress to legislate upon various matters where no express power was given has been given to us through a long line of cases. There has been a gradual growth of the recognition of the power of congress to legislate upon different matters with the progress and development of this nation. New problems are arising from time to time as our civic life becomes more complex and the demand for their solution extend beyond state boundaries, and con-

gress is called upon to meet these new conditions and would be remiss in its duty did it not attempt to solve the new questions by eliminating and forbidding national evils, regulating where state regulation would fail, and taking control where state control is no longer practicable.

In order that the extent to which the courts have recognized the necessity and the right of congress to legislate upon matters not expressly set out in the constitution may be emphasized and the further fact noted that where congress has definitely taken control of a subject matter under sanction of the court the act of congress is paramount and supercedes state legislation upon that subject we have quoted at length from some of the more important cases discussing these matters.

Chief Justice Marshall writing the decision in the case of *McCulloch v. Maryland* said:

> "If any one proposition could command the universal assent of mankind, we might expect it would be this—that the government of the union, though limited in its powers, is supreme within its sphere of action. This would seem to result, necessarily, from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all. Though any one state may be willing to control its operations, no state is willing to allow others to control them. The nation, on those subjects on which it can act, must necessarily bind its component parts. But this question is not left to mere reason: the people have, in express terms, decided it by saying, 'This constitution and the laws of the United States, which shall be made in pursuance thereof,'

> shall be the supreme law of the land,' and by requiring that the members of the state legislatures, and the officers of the executive and judicial departments of the states, shall take the oath of fidelity to it. The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the constitution, form the supreme law of the land, 'anything in the constitution or laws of any state to the contrary notwithstanding.'"
>
> 4 Wheaton 404.

In the same case this learned judge laid down a principle which has not been successfully attacked for any period of time before the courts of this country when he said:

> "The court has bestowed on this subject its most deliberate consideration. The result is a conviction that the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the constitution has declared. We are unanimously of opinion, that the law passed by the legislature of Maryland, imposing a tax on the bank of the United States, is unconstitutional and void."
>
> 4 Wheat. 435.

In the case of *Houston v. Moore* the court, following the lead of the opinion in the case just cited, goes into detail as to what it considered were the rights of the states therein when congress has seen fit to exercise its constitutional powers upon a given subject matter. The judge said:

"After this, can the state governments enter upon the same ground * * * provide for the same objects, as they may think proper, and punish in their own way violations of the laws they have so enacted? The affirmative of this question is asserted by the defendant's counsel, who, it is understood, contend that unless such state laws are in direct contradiction to those of the United States, they are not repugnant to the constitution of the United States.

From this doctrine, I must, for one, be permitted to dissent. The two laws may not be in such absolute opposition to each other, as to render the one incapable of execution, without violating the injunctions of the other; and yet, the will of the one legislature may be in direct collision with that of the other. This will is to be discovered, as well by what the legislature has not declared, as by what they have expressed. Congress, for example, has declared, that the punishment for disobedience of the act of congress, shall be a certain fine; if that provided by the state legislature for the same offence be a similar fine, with the addition of imprisonment or death, the latter law would not prevent the former from being carried into execution, and may be said, therefore, not to be repugnant to it. But surely the will of congress is, nevertheless, thwarted and opposed.

If, in a specified case, the people have thought proper to bestow certain powers on congress, as the safest depositary of them, and congress has legislated within the scope of them, the people have reason to complain, that the same powers should be exercised at the same time by the state legislatures. To subject them to the operation of two laws upon the same subject, dictated by distinct wills, particularly in a case inflicting pains and penalties, is, to my

apprehension, something very much like oppression, if not worse. In short, I am altogether incapable of comprehending how two distinct wills can, at the same time, be exercised in relation to the same subject, to be effectual, and at the same time, compatible with each other. If they correspond in every respect, then the latter is idle and inoperative; if they differ, they must, in the nature of things, oppose each other, so far as they do differ. If the one imposes a certain punishment, for a certain offense, the presumption is, that this was deemed sufficient, and, under all circumstances, the only proper one. If the other legislature impose a different punishment, in kind or degree, I am at a loss to conceive, how they can both exist harmoniously together."

5 Wheat. 20, 23.

Upon the question as to whether the power to regulate is conclusive, the court in the case of *Gibbons v. Ogden* said:

"It has been concluded that, as the word 'regulate' implies in its nature full power over the things to be regulated, it excludes necessarily the action of all others that would perform the same operation on the same thing. That regulation is designed for the *entire result* applying to those parts which remain as they were, as well as to those which are altered. It produces a uniform whole, which is as much disturbed and deranged by changing what the regulating power designs to leave untouched, as that on which it has operated. There is great force in the argument, and the court is not satisfied that it has been refuted."

9 Wheat. 1.

In *Prigg v. Commonwealth of Pa.* (16 Pet. 617), the court holds that where congress does regulate, such legislation of congress in what it does prescribe, manifestly indicates that it does not intend that there shall be any further legislation to act upon the subject matter and its silence as to what it does not do is as expressive of what its intention is, as the direct provisions made on it.

In the later case of *Henderson, et al. v. Mayor of New York, et al.*, the court in sustaining former decisions said:

> "The accuracy of these definitions is scarcely denied by the advocates of the state statutes. But assuming, that, in the formation of our government, certain powers necessary to the administration of their internal affairs are reserved to the states, and that among these powers are those for the preservation of good order, of the health and comfort of the citizens, and their protection against pauperism and against contagious and infectious diseases, and other matters of legislation of like character, they insist that the power here exercised falls within this class, and belongs rightfully to the states.
>
> This power, frequently referred to in the decisions of this court, has been in general terms, somewhat loosely called the police power. It is not necessary for the course of this discussion to attempt to define it more accurately than it has been defined already. It is not necessary, because whatever may be the nature and extent of that power, where not otherwise restricted, no definition of it, and no urgency for its use, can authorize a state to exercise it in regard to a subject matter which has been confided exclusively to the dis-

ercion of congress by the constitution.

But, however difficult this may be, it is clear, from the nature of our complex form of government, that, whenever the statute of a state invades the domain of legislation which belongs exclusively to the congress of the United States, it is void, no matter under what class of powers it may fall, or how closely allied to powers conceded to belong to the states.

'It has been contended,' says Marshall C. J., 'that if a law passed by a state, in the exercise of its acknowledged sovereignty, comes into conflict with a law passed by congress in pursuance of the constitution, they affect the subject and each other like equal opposing powers. But the framers of our constitution foresaw this state of things, and provided for it by declaring the supremacy, not only of itself, but of the laws made in pursuance thereof. The nullity of any act inconsistent with the constitution is produced by the declaration that the constitution is supreme.' Where the federal government has acted, he says, 'In every such case the acts of congress or the treaty is supreme; and the laws of the state, though enacted in the exercise of powers not controverted, must yield to it.'"

9 Wheat. 210.

92 U. S. 271, 272.

In the case of *Ex Parte Yarbrough* this court said:

"The brief of the counsel before us, though directed to the authority of that body to pass criminal laws, uses the same language. Because there is no express power to provide for preventing violence exercised on the voter as a means of controlling his vote, no such law can be enacted. It destroys at one blow, in

construing the constitution of the United States, the doctrine universally applied to all instruments of writing, that what is implied is as much a part of the instrument as what is expressed. This principle, in its application to the constitution of the United States, more than to almost any other writing, is a necessity, by reason of the inherent inability to put into words all derivative powers—a difficulty which the instrument itself recognizes by conferring on congress the authority to pass all laws necessary and proper to carry into execution the powers expressly granted and all other powers vested in the government or any branch of it by the constitution."

110 U. S. 658.

Mr. Justice Harlan, in *New Orleans Gas Co. v. Louisiana Light Co.*, said:

"Definitions of the police power must, however, be taken, subject to the condition that the state cannot, in its exercise, for any purpose whatever, encroach upon the powers of the general government, or rights granted or secured by the supreme law of the land."

115 U. S. 650, 661.

Again, in reference to quarantine laws, Justice Miller, in *Morgan Steamship Co. v. Louisiana*, said:

"For, while it may be a police power in the sense that all provisions for the health, comfort and security of the citizens are police regulations, and an exercise of the police power, it has been said more than once in this court that, where such powers are so exercised as to come within the domain of federal authority as defined by the constitution, the latter must prevail. *Gibbons v. Ogden*, 9 Wheat. 1, 210; *Henderson v. The Mayor*, 92 U. S. 259, 272;

New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650, 661."
118 U. S. 455, 464

In *Robbins v. Shelby Taxing District*, Mr. Justice Bradley goes even farther and gives these citations:

"Another established doctrine of this court is, that where the power of congress to regulate is exclusive the failure of congress to make express regulations indicates its will that the subject shall be left free from any restrictions or impositions; and any regulation of the subject by the states, except in matters of local concern only, as hereafter mentioned, is repugnant to such freedom. This was held by Mr. Justice Johnson in *Gibbons v. Ogden*, 9 Wheat. 1, 222; by Mr. Justice Grier in the Passenger Cases, 7 How. 283, 462; and has been affirmed in subsequent cases. State Freight Tax Cases, 15 Wall. 232, 279; *Railroad Co. v. Husen*, 95 U. S. 465, 469; *Welton v. Missouri*, 91 U. S. 275, 282; *Mobile v. Kimball*, 102 U. S. 691, 697; *Brown v. Houston*, 114 U. S. 622, 631; *Walling v. Michigan*, 116 U. S. 446, 455; *Pickard v. Pullman Southern Car Co.*, 117 U. S. 34; *Wabash etc. Ry Co. v. Illinois*, 118 U. S. 557."
120 U. S. 489, 493.

The court in the case of *Connolly v. Union Sewer Pipe Company*, said:

"The question of constitutional law to which we have referred cannot be disposed of by saying that the statute in question may be referred to what are called the police powers of the state, which, as often stated by this court, were not included in the grants of power to the general government, and therefore

were reserved to the states when the constitution was ordained. But as the constitution of the United States is the supreme law of the land, anything in the constitution or statutes of the states to the contrary notwithstanding, a statute of a state, even when avowedly enacted in the exercise of its police powers, must yield to that law."

184 U. S. 540, 558.

In the case of *Mondou v. New York, New Haven and Hartford Ry. Company*, the court laid down the principle in the following words:

"State legislation, even if in pursuance of a reserved power, must give way to an act of congress over a subject within the exclusive control of congress. * * *

The inaction of congress on a subject within its power does not affect that power. * * *

This power over commerce among the states, so conferred upon congress, is complete in itself, extends incidentally to every instrument and agent by which such commerce is carried on, may be exerted to its utmost extent over every part of such commerce, and is subject to no limitations save such as are prescribed in the constitution. But of course, it does not extend to any matter or thing which does not have a real or substantial relation to some part of such commerce * * * (page 47).

Government of the union, though limited, is supreme within its sphere of action. Though any one state may be willing to control its operations, no state is willing to allow others to control them. The nation on those subjects which it can act, must necessarily bind its component parts. But this question is not left to mere reason; the people have, in express terms, decided it by saying, 'This constitution, and the laws of the United States which shall

be made in pursuance thereof * * * shall be the supreme law of the land,' and by requiring the members of state legislature and the officers of the executive and judicial departments of the states shall take oath of fidelity to it. * * * (page 53).

It follows that any legislation of a state although in pursuance of an acknowledged power reserved to it, which conflicts with the actual exercise of the power of congress over the subject of commerce, must give way before the supremacy of the national authority. * * *

True, prior to the present act the laws of the several states were regarded as determinative of the liability of employers engaged in interstate commerce for injuries received by their employees while engaged in such commerce. But that was because congress although empowered to regulate that subject, had not acted thereon, and because the subject is one which falls within the police power of the states in the absence of action by congress. * * *

Sherlock v. Alling, 93 U. S. 99; *Smith v. Alabama*, 124 U. S. 465, 473, 480, 482; *Nashville Railway v. Alabama*, 128 U. S. 96, 99; *Reid v. Colorado*, 187 U. S. 137, 146. * * *

The inaction of congress, however, in no wise affected its power over the subject. The Lottawanna, 21 Wall. 558, 581, *Gloucester Ferry Co. v. Pa.*, 114 U. S. 196, 215. * * *

And now that congress has acted the laws of the states, in so far as they cover the same field, are superseded, for necessarily that which is not supreme must yield to that which is.

Gulf, Colorado and Sante Fe Ry. Co. v. Hefley, 158 U. S. 98; *Southern Ry. Co. v. Reid*, 222 U. S. 424; *Northern Pacific Ry. v. Washington*, 222 U. S. 370. * * *

> When congress, in the exertion of the power confided to it by the constitution adopted the act it spoke for all the people and all the states, and thereby established a policy for all. That policy is as much the policy of Connecticut as if the act had emanated from its own legislature and should be respected accordingly in the courts of the state."
>
> 223 U. S. 1.

These cases extend from the time that the question first arose down to 1911 when the employers liability cases were decided and cover many fields of activity. It is also important to note that whenever a case might appear to be decided contra by the majority of the court there was a strong, able and vigorous dissenting opinion, and these marginal cases were usually decided by only a majority of one. So firmly have these general principles been imbedded in our federal structure.

II.

Congress passed the Harrison Narcotic Drug Act in 1914 which act was approved and became a law December 17th of said year. This act is very sweeping and covers the whole field of the regulation of the sale, dispensing, disposal, furnishing and the giving of drugs, going into considerable detail as to the means and methods of disposing of narcotic drugs. This act specifically made provision for the handling of said drugs by physicians and set forth the conditions under which they could make use of drugs which was limited to

the treatment of *bona fide* patients in the practice of the medical profession.

The United States District Courts very generally upheld the act as constitutional although it was vigorously attacked in almost every case as an invasion of the police power reserved to the states.

In the case of the *United States v. Doremus* the lower court held section 2 of said act unconstitutional for the reason that it was not a revenue measure, and was an invasion of the police power reserved to the states and the case came before this Honorable Court upon the appeal of the United States and the decision of a majority of this court is as follows:

> "The second count charges in substance that: Doremus did unlawfully and knowingly sell, dispense and distribute to one Ameris five hundred one-sixth grain tablets of heroin not in the course of the regular professional practice of Doremus, and not for the treatment of any disease from which Ameris was suffering, but as was well known by Doremus, Ameris was addicted to the use of the drug as a habit, being a person popularly known as a 'dope fiend,' and that Doremus did sell, dispense, and distribute the drug, heroin, to Ameris for the purpose of gratifying his appetite for the drug as an habitual user thereof.
>
> Section one of the act requires persons who produce, import, manufacture, compound, deal in, dispense, sell, distribute, or give away opium or coca leaves or any compound, manufacture, salt, derivative or preparation thereof, to register with the collector of internal

revenue of the district his name or style, place of business, and place or places where such business is to be carried on. At the time of such registry every person who produces, imports, manufactures, compounds, deals in, dispenses, sells, distributes, or gives away any of the said drugs is required to pay to the collector a special tax of $1.00 per annum. It is made unlawful for any person required to register under the terms of the act to produce, import, manufacture, compound, deal in, dispense, sell, distribute, or give away any of the said drugs without having registered and paid the special tax provided in the act.

Section 2 provides in part:

'It shall be unlawful for any person to sell, barter, exchange, or give away any of the aforesaid drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the commissioner of internal revenue. Every person who shall accept any such order, and in pursuance thereof shall sell, barter, exchange or give away any of the aforesaid drugs, shall preserve such order for a period of two years in such way as to be readily accessible to inspection by any officer, agent, or employee of the treasury department duly authorized for that purpose, and the state, territorial, district, municipal, and insular officials named in section five of this act. Every person who shall give an order as herein provided to any person for any of the aforesaid drugs shall, at or before the time of giving such order, make or cause to be made a duplicate thereof on a form to be issued in blank for that purpose by the commissioner of internal revenue, and in case of the acceptance of such order, shall preserve said dupli-

cate for a period of two years in such a way as to be readily accessible to inspection by the officers, agents, or employees and officials hereinbefore mentioned. Nothing contained in this section shall apply—

(a) To the dispensing or distribution of any of the aforesaid drugs to a patient by a physician, dentist or veterinary surgeon regularly registered under this act in the course of his professional practice only: Provided, that such physician, dentist, or veterinary surgeon shall keep a record of all such drugs dispensed or distributed, showing the amount dispensed or distributed, the date, and the name and address of the patient to whom such drugs are dispensed or distributed, except such as may be dispensed or distributed to a patient upon whom such physician, dentist, or veterinary surgeon shall personally attend; and such record shall be kept for a period of two years from the date of dispensing or distributing such drugs, subject to inspection, as provided in this act.

(b) To the sale, dispensing or distribution of any of the aforesaid drugs by a dealer to a consumer under and in pursuance of a written prescription issued by a physician, dentist, or veterinary surgeon registered under this act: provided, however, that such prescription shall be dated as of the day on which signed and shall be signed by the physician, dentist, or veterinary surgeon who shall have issued the same: And provided further, that such dealer shall preserve such prescription for a period of two years from the day on which such prescription is filled in such a way as to be readily accessible to inspection by the officers, agents, employees, and officials hereinbefore mentioned.'

It is made unlawful for any person to ob-

tain the drugs by means of the order forms for any purpose other than the use, sale or distribution thereof by him in the conduct of a lawful business in said drugs, or the legitimate practice of his profession.

It is apparent that the section makes sales of these drugs unlawful except to persons who have the order forms issued by the commissioner of internal revenue, and the order is required to be preserved for two years in such way as to be readily accessible to official inspection. But it is not to apply (a) to physicians, etc., dispensing and distributing the drug to patients in the course of professional practice, the physician to keep a record thereof, except in the case of personal attendance upon a patient; and (b) to the sale, dispensing, or distributing of the drugs by a dealer upon a prescription issued by a physician, etc., registered under the act. Other exceptions follow which are unnecessary to the consideration of this case.

Section nine inflicts a fine or imprisonment, or both, for violations of the act.

This statute purports to be passed under the authority of the constitution, article one, section 8, which gives the congress power 'to lay and collect taxes, duties, imposts, and excises to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States.'

The only limitation upon the power of congress to levy excise taxes of the character now under consideration is geographical uniformity throughout the United States. This court has often declared it cannot add others. Subject to such limitation congress may select the subjects of taxation, and may exercise the

power conferred at its discretion. *License Tax Cases*, 5 Wallace 462, 471. Of course congress may not in the exercise of federal power exert authority wholly reserved to the states. Many decisions of this court have so declared. And from an early day the court has held that the fact that other motives may impel the exercise of federal taxing power does not authorize the courts to inquire into that subject. If the legislation enacted has some reasonable relation to the exercise of the taxing authority conferred by the constitution, it cannot be invalidated because of the supposed motives which induced it. *Veazie Bank v. Fenno*, 8 Wall. 533, 541; in which case this court sustained a tax on a state bank issue of circulating notes. *McCray v. United States*, 195 U. S. 27, where the power was thoroughly considered, and an act levying a special tax upon oleomargarine artificially colored was sustained. And *see Flint v. Stone Tracy Co.*, 220 U. S. 107, 147, 153, 156 and cases cited.

Nor is it sufficient to invalidate the taxing authority given to the congress by the constitution that the same business may be regulated by the police power of the state. *License Tax Cases*, 5 Wall., *supra*.

The act may not be declared unconstitutional because its effect may be to accomplish another purpose as well as the raising of revenue. If the legislation is within the taxing authority of congress—that is sufficient to sustain it. In *re Kollock*, 165 U. S. 526, 536.

The legislation under consideration was before us in a case concerning section eight of the act, and in the course of the decision we said: 'It may be assumed that the statute has a moral end as well as revenue in view, but we are of opinion that the District Court in treating those ends as to be reached only

through a revenue measure and within the limits of a revenue measure, was right.' United *States v. Gin Fuey Moy*, 241 U. S. 394, 402. Considering the full power of congress over excise taxation the decisive question here is: Have the provisions in question any relation to the raising of revenue? That congress might levy an excise tax upon such dealers, and others who are named in section one of the act, cannot be successfully disputed. The provisions of section 2, to which we have referred, aim to confine sales to registered dealers and to those dispensing the drugs as physicians, and to those who come to dealers with legitimate prescriptions of physicians. Congress, with full power over the subject, short of arbitrary and unreasonable action which is not to be assumed, inserted these provisions in an act specifically providing for the raising of revenue. Considered of themselves, we think they tend to keep the traffic aboveboard and subject to inspection by those authorized to collect the revenue. They tend to diminish the opportunity of unauthorized persons to obtain the drugs and sell them clandestinely without paying the tax imposed by the federal law. This case well illustrates the possibility which may have induced congress to insert the provisions limiting sales to registered dealers and requiring patients to obtain these drugs as a medicine from physicians or upon regular prescriptions. Ameris, being as the indictment charges an addict, may not have used this great number of doses for himself. He might sell some to others without paying the tax, at least congress may have deemed it wise to prevent such possible dealings because of their effect upon the collection of the revenue.

W cannot agree with the contention that the

provisions of § 2, controlling the disposition of these drugs in the ways described, can have nothing to do with facilitating the collection of the revenue, as we should be obliged to do if we were to declare this act beyond the power of congress acting under its constitutional authority to impose excise taxes. It follows that the judgment of the District Court must be reversed."

In the case of *Webb and Goldbaum v. United States*, this court giving the facts and answering the question propounded by the Circuit Court of Appeals says:

"Webb was a practicing physician and Goldbaum a retail druggist, in Memphis. It was Webb's regular custom and practice to prescribe morphine for habitual users, upon their application to him therefor. He furnished these 'prescriptions,' not after consideration of the applicant's individual case, and in such quantities and with such direction as, in his judgment, would tend to cure the habit, or as might be necessary or helpful in an attempt to break the habit, but with such consideration and rather in such quantities as the applicant desired for the sake of continuing his accustomed use. Goldbaum was familiar with such practice and habitually filled such prescriptions. Webb had duly registered and paid the special tax as required by section 1 of the act. Goldbaum had also registered and paid such tax and kept all records required by the law. Goldbaum had been provided with the blank forms contemplated by section 2 of the act for use in ordering morphine, and, by the use of such blank order forms, had obtained from the wholesalers, in Memphis, a stock of morphine. It had been agreed and understood between Webb and Goldbaum that Goldbaum should, by using

such order forms, procure a stock of morphine, which morphine he should and would sell to those who desired to purchase and who came provided with Webb's so-called prescriptions. It was the intent of Webb and Goldbaum that morphine should thus be furnished to the habitual users thereof by Goldbaum and without any physician's prescription issued in the course of a good faith attempt to cure the morphine habit. In order that these facts may have their true color, it should also be stated that within a period of eleven months Goldbaum purchased from wholesalers, in Memphis, thirty times as much morphine as was bought by the average retail druggist doing a larger general business, and he sold narcotic drugs in 6,500 instances; that Webb regularly charged fifty cents for each so-called prescription, and within this period had furnished, and Goldbaum had filled, over four thousand such prescriptions; and that one Rabens, a user of the drug, came from another state and applied to Webb for morphine and was given at one time ten so-called prescriptions for one drachm each, which prescriptions were filled at one time by Goldbaum upon Rabens' presentation, although each was made out in a separate and fictitious name."

Upon these facts the Circuit Court of Appeals propounds to this court three questions:

1. "Does the first sentence of section 2 of the Harrison Act prohibit retail sales of morphine by druggists to persons who have no physician's prescription, who have no order blank therefor and who cannot obtain an order blank because not of the class to which such blanks are allowed to be issued?

2. If the answer to question one is in the affirmative, does this construction make unconstitutional the prohibition of such sale?

3. If a practicing and registered physician issues an order for morphine to an habitual

user thereof, the order not being issued by him in the course of professional treatment in the attempted cure of the habit, but being issued for the purpose of providing the user with morphine sufficient to keep him comfortable by maintaining his customary use, is such order a physician's prescription under exception (b) of section 2?

If question one is answered in the negative, or question two in the affirmative, no answer to question three will be necessary; and if question three is answered in the affirmative, questions one and two became immaterial.

What we have said of the construction and purpose of the act in No. 367 plainly requires that question one should be answered in the affirmative. Question two should be answered in the negative for the reasons stated in the opinion in No. 367. As to question three—to call such an order for the use of morphine a physician's prescription would be so plain a perversion of meaning that no discussion of the subject is required. That question should be answered in the negative."

While this phase of the Harrison Narcotic Drug Act has been before this court in only these two cases, there have been a number of cases arising under section 2 of said act before the District Courts and Circuit Court of Appeals in several circuits. In almost all of these cases one of the questions arising was whether this act was unconstitutional, especially as to section 2 since it was an infringement upon the police power of the states, and, while the lower courts have usually very frankly admitted that the probable purpose of congress was not the passage of a revenue measure but rather intended to regulate the sale and disposal of narcotics and the conditions under

which they could be dispensed or prescribed by members of the medical profession, they have with very few exceptions sustained the constitutionality of this section of said act, largely for the reason as given by the court in the case of *Thompson v. United States* (C. C. A. 8th Circuit, 1919) 258 Fed. 196, that "the object of the act, although enacted under the taxing power of congress, was no doubt intended to prevent the growing use of these narcotics, deemed a menace to the nation by congress."

Congress and the Federal Courts have recognized that the regulation of the sale and disposal of narcotics has become a national problem to be handled by the national authorities. It is such a question as cannot be met and solved by state action since uniformity of action is necessary to a proper solution. Any continued attempt by the states or any one of them to legislate upon this general subject or any phase of it, is an interference with the successful solution of this problem as now attempted by congress. Although Chapter 260 of the General Laws of Minnesota for 1915 was an apparent attempt upon the part of the state legislature of Minnesota to pass an act in conformity with and following the provisions of the Harrison Narcotic Drug Act, the state courts have interpreted it otherwise, and the provision dealing with the treatment of addicts by physicians has been interpreted in such a manner as to bring the provisions of the state law in conflict with the federal act.

After it has been determined that the Harrison Narcotic Act is constitutional and comes within the implied powers of congress and is a proper subject of legislation by the federal authorities, the important and almost sole issue to be raised under section 2 of said act is whether the treatment of an addict by the physician was in good faith or in the course of his professional practice. The few quotations from decisions which follow give a fair statement of the attitude of practically all the courts having heard similar cases upon the provisions contained in section 2 of said Harrison Act.

In the case of *Saunders, et al. v. United States* (C. C. A. 1919), the court said:

> "The indictment in substance charged that under a fictitious prescription defendants sold and dispensed one-eighth of an ounce of morphine sulphate, a derivative of opium, to one Joe Peak, without the written order form required by the act (38 Stat. 786, Sec. 2, Comp. Stat. Sec. 6287h), and that the offense was committed in this way; Saunders, on August 9, 1917, made and issued to Peak a prescription for the drug, under date, however, of August 10th, and in the name and with the address of Florence McKaight, and not in the course of his professional practice only, nor in good faith to treat Peak as a patient for a disease or otherwise. Saunders also aided and abetted, induced and procured, Thompson to fill the prescription and to sell the morphine sulphate to Peak, and on the same day, August 9th, Thompson with knowledge of these facts filled the prescription and sold the morphine sulphate to Peak; such acts being committed with intent on the part of both defendants to evade the provisions of the act mentioned."
>
> 260 Fed. 387.

In the case of *Friedman, et al. v. United States* (C. C. A. 6, 1919), it was said:

> "The first count in substance charged that Friedman and the Thompsons, in January, 1917, and continuously thereafter until the date of the indictment, December 3, 1917, at Memphis, Tenn., unlawfully conspired and agreed among themselves to sell and dispense large quantities of morphine sulphate, a derivative of opium, to divers persons to the grand jurors unknown and without the written order forms required by the act; the plan of the conspiracy being as follows: Friedman, a physician and registered under the act, was to prepare and deliver prescriptions for morphine sulphate to applicants who were in fact or were claiming to be addicted to the use of narcotic drugs, though not with an intent on his part in good faith or in the course of his professional practice only to meet the immediate needs or to effect a cure of such persons, but for the purpose of catering to and satisfying their cravings, and the Thompsons, being engaged in business and registered under the act as retail druggists, were to fill these prescriptions and sell and dispense the drug for the purpose mentioned and not in the conduct of a lawful business. That in pursuance of the conspiracy, and to effect its object defendants unlawfully committed the following acts at Memphis: (1) On or about August 1, 1917, Friedman made and signed a prescription in the name of F. Hassel, with a definite address in New Orleans, for ten one-eighth ounces of morphine sulphate, delivering the prescription to Homer Vance, with specific address in New Orleans and for a like quantity of morphine sulphate, and the Thompsons filled this prescription and it was also found in their files."
>
> 260 Fed. 389.

The court in this Friedman case affirmed the

position of the lower court as recorded in 224 Fed. 276.

In the case of *Trader v. United States*, the court said:

> "Although the bill of exceptions has brought before us only the indictment and the charge of the trial court, it may be fairly gathered therefrom that Trader was a practicing physician in the city of Pittsburgh, and was engaged in the dispensing or sale of morphine sulphate in such a way and to such an extent as to fairly raise a question of fact as to whether or not he was dispensing it in good faith, in the course of his legitimate practice as a physician, or whether he was using his license to practice as a physician as a mere cloak to cover the distribution or sale of the drug to drug addicts, not to effect a cure, but to satisfy their craving for it. That question was submitted to the jury with instructions that the defendant's guilt or innocence under the first 20 counts of the indictment (providing, of course, that in each individual case the act of dispensing was established) depended upon whether or not the defendant dispensed the drug to the persons therein named in good faith, in the legitimate practice of his profession as a physician, and under the twenty-first count upon the purpose for which he acquired it. The verdict has established that the defendant did not acquire the drug for use, and did not dispense it to the persons named in the indictment in the course of his legitimate practice as a physician."
>
> (3. C. C. A., 1919) 260 Fed. 924.

In *Thompson v. United States*, 8th Circuit, C. C. A. (1919), the court held that:

> "The good faith of the defendant treating these persons as a physician, for the purpose of curing them from the narcotic habit, is the

main and only issue involved in this case.

If physicians and the others mentioned in the exceptions can sell and dispense these narcotics, regardless of the fact whether it is done in good faith for the relief of a patient, then the moral object of the act is entirely defeated. It certainly cannot be claimed that a physician selling these narcotics, not in good faith, for the purpose of securing a cure of one suffering from an illness, or to cure him from the morphine habit, is doing so 'in the course of his professional practice only,' as prescribed by the express language of the act."

258 Fed. 196.

In *Foreman v. United States,* C. C. A. 4th Circuit, Dec. 1918, the court held that,

"what the statute forbids is sale, barter, exchange or gift, including such distribution and dispensing by a physician *not in the course of his practice* as would amount to participation in a sale, barter, exchange, or gift."

255 Fed. 621, 624.

The court said in *U. S. v. Fleming and Son* (1918):

"Examining the first exception it is perfectly apparent that the physician in order to bring himself within the exception, must comply with the conditions attached thereto, namely, first, he must register under the act; second, he can dispense such drugs only to a patient in the course of his professional practice; third, he must make and keep a record of the drugs dispensed as therein provided and preserve the same for two years. If the physician fails to observe any of these conditions attached to the exception, he takes himself out of the exception and becomes liable under the general provisions of Sec. 2 making all sales except on order from the purchaser

unlawful. Failure to observe the clear distinction between the violation of the conditions annexed to the exception had led to great confusion in the drawing of indictments and in judicial decisions in the various federal jurisdictions.

Turning to the exception (b) we find also certain conditions attached thereto, namely, the provisions of section 2 shall not apply to the sale, dispensing, or distribution of the drugs by a dealer to a consumer, if made (1) under and in pursuance of a written prescription issued by a physician registered under the act: (2) provided such prescription shall be dated as of the day on which signed, and shall be signed by the physician issuing the same: (3) such prescription shall be preserved for two years, for the purpose of official inspection.

These are the sole exceptions which congress has prescribed as governing the sale and distribution of narcotics by the registered dealers. It appears that congress undertook to regulate the amount of such sales by putting the limitations on the physician who prescribes the drug and not on the druggist who fills it. The former is supposed to know the needs of his patient and to prescribe accordingly. And if he distributes the drugs to others than his patients, or in amounts not warranted in the legitimate practice of his profession for the purpose of alleviating suffering or effecting a cure, he is not protected by the exception, and becomes criminally liable for the violations of the generan provisions of section 2. Wisely or unwisely, congress appears to have placed no other limitation whatever on the amount of the sale. It made the prescription of the registered physician the sole and sufficient warrant for the sale by the druggist of the drugs therein prescribed. Evidently it was intended that, if the druggist keeps within the limitations of the prescription, he is protected thereby. In an act prescribing severe penalties for its vio-

lation, courts dare not become wiser than the law makers and attempt to read into the act something which the law makers have omitted.

The provision near the end of section 2 makes it unlawful to obtain by means of order forms any of said drugs for any purpose other than the use, sale, or distribution thereof (if a dealer) in the conduct of a lawful business in said drugs, or (if a physician) in the legitimate practice of his profession. A careful scrutiny of the act makes it reasonably apparent that the meaning of the words '*in the legitimate practice of his profession*' and 'in the conduct of a lawful business in said drugs' are defined and fixed by the limitations on the action of physicians and druggists prescribed in exceptions (a) and (b). In other words if a physician prescribes drugs to patients in course of his professional practice only, this constitutes the use, sale or distribution in the legitimate practice of his profession and if the dealer sells or dispenses the drugs only in pursuance of a written prescription issued by a registered physician and dated as of the day it was signed, then such drugs are distributed by him in the conduct of a lawful business in such drugs. These provisions embraced in the same section, one relating to the acquisition of the drugs and the other to their sale and distribution when thus read are in complete harmony."

251 Fed. 932.

The cases of *Melanson v. United States* and *Ellsworth v. United States* were those in which physicians gave 900 and 700 prescriptions each for from 15 to 60 grains within a period of three months and all being filled at one drug store. The Circuit Court of Appeals in reviewing these cases said:

"It was for the jury to determine, in each case, whether the dispensing of the drug was a dispensing of it by a physician to a patient, in which case no order form was required, or whether the form of a prescription was used by the defendants as an evasion of the law, and not in good faith, in which case the dispensing would be a sale, and an order form would be necessary to bring it within the law. The amount of the drug prescribed in the Ellsworth case to Clifford Frank, and the frequency, amount and circumstances attending the issuance of the prescription to Banning and others, and Banning's own testimony as to its intended use, and Melanson's probable knowledge thereof, made it a question for the jury to determine whether Frank and Banning were consumers of the drug, and not patients of defendants, and whether Melanson, and Ellsworth and Dolan knew the true character in which they sought to procure it from defendants. In the latter event, the transaction would be a mere sale. * * * The defendants could only protect themselves, under the act, if the prescriptions were issued in the legitimade course of their professional practice."

Fifth Circuit, 1919, 256 Fed. Rep. 787, 788.

In the case of *Reeves v. United States* this same court in 263 Fed. 691, again emphasized the fact that the question of good faith upon the part of the physician was the real matter at issue, and that it was material and proper for members of the medical profession to testify as to the method recognized by the medical profession for the treatment of drug addicts.

In the case at bar the trial court took the question of good faith of the physician away from the jury as well as the question as to whether the grad-

ual reduction method reducing the prescription from 23 grains per day to six grains per day in six months' time was such a treatment as is recognized as proper by the medical profession.

III.

The proposition that the construction placed upon a state statute by the court of last resort of that state is conclusive upon the Federal Courts is so generally accepted that attention will be called to only a few cases which lay down the general principle.

> "The construction by the courts of a state of its constitution and statutes is, as a general rule, binding on the Federal Courts. We may think that the Supreme Court of a state has misconstrued its constitution or its statutes, but we are not at liberty to therefore set aside its judgments. That court is the final arbiter of such questions."
>
> *Forsythe v. Hammond*, 166 U. S. 506, 518 (1896).

> "The interpretation within the jurisdiction of a state of a local law, becomes a part of that law, as much so as if incorporated in the body of it by the legislature. If different interpretations are given in different states to a similar law, that law, in effect, becomes, by the interpretations, so far as it is a rule for action by this court, a different law in one state from what it is in another."
>
> *Christy v. Pridgeon*, 4 Wall. 196 (1866).

> "In the argument it is insisted that the construction given by the Supreme Court of North Carolina to the statute is wrong since in effect it reads out the provisions of Sec. 7 and

it is urged that it is the duty of this court to disregard the interpretations affixed by the state court, thereby bringing the statute within the prohibitions of the 14th amendment. But it is elementary that, under the circumstances, we must follow the construction given by the state court, and test the constitutionality of the statutes under that view.

Citing *Armour Packing Co. v. Lacy*, 200 U. S. 226; *Smiley v. Kansas*, 196 U. S. 447 and cases cited."

Gatewood v. North Carolina, 203 U. S. 531, 541.

Speaking of the correctness of a decision of a state court in the case of *Louisiana v. Pilsbury*, the court said:

"Whether such a construction was a sound one is not an open question in considering the validity of the bonds. The exposition given by the highest tribunal of the state must be taken as correct so far as contracts made under the act are concerned. So far does this doctrine extend, that when a statute of two states, expressed in the same terms, is construed differently by the highest courts, they are treated by us as different laws, each embodying the particular construction of its own state, and enforced in accordance with it in all cases arising under it."

105 U. S. 278, 294.

IV.

A careful comparison of Chapter 260, General Laws of Minnesota, 1915, approved April 23, 1915, with the Harrison Narcotic Drug Act of Dec. 17, 1914 (38 Stat. 785; Section 6287g to n United States Compiled Statutes) shows that the state

legislature of Minnesota had in mind the national law and attempted to re-enact it into state law. Not only the ideas embodied in the Harrison Act but the phraseology as well was embodied in the state law, the exemptions and exceptions being similar.

This applies to all the provisions of the act with the possible exception of section 2 of the state law, especially as interpreted by the state courts. As to this provision that a physician cannot treat an addict according to the best practice of the medical profession in order to effect a cure and the holding that the question of good faith is not an issue to be tried in determining the guilt or innocence of a physician charged with the violation of Section 2 of Chapter 260, it is in conflict with the provisions of the Harrison Narcotic Act which recognizes the right of a physician to treat an addict if done in good faith in the practice of his profession only. It is probable that the state legislature intended that Section 2 of the state law should be interpreted to be in harmony with the Federal Act and to give a physician the same rights in the use of drugs in the practice of his profession, for at the session of the state legislature following the conviction of Dr. C. D. Whipple the State Legislature of Minnesota so amended Section 2 as to make clear its intention as to the use of the word prescribe. This amendment is known as Chapter 208 of the Session Laws of Minnesota, for 1919, and is as follows:

"Section 1. Certain narcotics prohibited—that Section 2, Chapter 260 of Laws 1915, be

amended so as to read as follows:

> Section 2. It shall be unlawful for any physician, surgeon or dentist to furnish to, or prescribe for, the use of any habitual user of the same any of the substances enumerated in Section 1, Chapter 260, Laws 1915, unless such physician, surgeon or dentist can show that it is necessary to furnish or prescribe the same to such user in order to save his life."

The words "furnish to" were added to that of prescribe after the trial judge held that the word "prescribe" had reference only to written prescriptions to be filled by a druggist, and after he had sustained an objection on the part of the state to the admission of testimony of several physicians as to what was the accepted meaning by the profession of the term "prescribe" in medical literature and in the profession.

The action of the trial judge in giving a narrow construction of the word prescribe and this interpretation being upheld by the Supreme Court of the state of Minnesota, determines the law insofar as Section 2 is concerned.

The purpose of the Harrison Narcotic Act is to regulate the sale and distribution of narcotic drugs and limit the dispensing of them to the general public to two means, to-wit: By and through physicians. This enables the federal authorities to limit the use of these drugs to *bona fide* treatments of the sick either to relieve pain or to cure those addicted to the use of one or more of these drugs. By limiting the physicians to the practice of their

profession only, congress has taken full control of the sale and disposition of these drugs and their disposal by physicians. There is no phase of this question left for state legislation since congress has made provision for the whole field of narcotic sale and disposal from the importation to the placing in the hands of the user and has developed an elaborate system for enforcing the same.

Chapter 260 of Laws, 1915, insofar as it conflicts with the Harrison Act is void and especially is this true of Section 2 of said state law wherein it is provided that a physician may not treat a patient in accordance with the practice of his profession if that patient be a drug addict.

The enforcement of this provision of the state law would come in conflict with the enforcement of the Harrison Narcotic Act and would mitigate against the successful operation of the Fereral Act in that it would prevent proper treatment of addicts by the gradual reduction method in that if only written prescriptions can be used the patient can no longer be kept in ignorance of the quantity of the drug he is consuming each day and one of the essential elements of the treatment is eliminated, and further where only written prescriptions can be used the addict can raise the amount stated upon the prescription and thus overcome the treatment being given by the physician in order to effect a cure. Physicians have had this difficulty to meet in the treatment of addicts until many physicians have refused to treat them and others will treat them only on condition that the physician

furnish the drug and no written prescriptions be placed in the hands of the addict to place temptation in his way to evade the law by securing more of the drug than the prescription originally called for. If such a provision were adopted by each of the states it would cause a serious handicap to the successful enforcement of the Harrison Act and operate to greatly interfere with the purpose for which it was enacted.

Fortunately, as soon as the state legislature met after such interpretation had been made, the provisions, which were interpretel as placing a ban upon good faith treatment of an addict to effect a cure, were modified to place the state law squarely in accord with the Federal Statute. The only conviction under this Section of Chapter 260, that has been secured in the state is that of the defendant herein. Other physicians were arrested and indicted about the same time there was a nolle of all their cases.

Complaint was first made against defendant that he was violating the Harrison Act and the matter was taken before a federal grand jury and investigated by the United States District Attorney and it was determined that the defendant was not violating any of the provisions of the Federal Act and a "no bill" was returned.

Apparently the states have recognized that this is a national problem and are satisfied not to attempt to enforce conflicting legislation since the decisions are free from cases raising the question of the conflict of these laws except those which have

arisen under the Federal Act which have been finally determined in its favor.

V.

The provisions of the Fourteenth Amendment to the Constitution of the United States have been recognized by the courts as giving to each citizen a certain amount of protection against infringement of his rights. No general principle has been laid down however as to how far state legislation may go before the privileges and immunities of the citizen is interfered with, or his life, liberty or property affected without due process of law. In fact the court in the case of *Allgeyer v. Louisiana*, 165 U. S. 578, laid down the rule that when or how far the police power of the states may be legitimately exercised with regard to the subjects set forth under the provisions of the Fourteenth Amendment must be left for determination in each case as it arises.

Some of the general principles laid down by the courts growing out of the application of the Fourteenth Amendment are set out in the decisions which follow.

Chief Justice Bradley in *Butcher's Union Company v. Crescent City Company* said:

> "The right to follow any of the common occupations of life is an inalienable right. It was formulated as such under the phrase 'pursuit of happiness' in the Declaration of Independence, which commenced with the fundamental proposition that 'all men are created

equal, that they are endowed by their creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness.' This right is a large ingredient in the civil liberty of the citizen.

I hold that the liberty of pursuit—the right to follow any of the ordinary callings of life—is one of the privileges of a citizen of the United States. It was held by a majority of the court in the former decision of the Slaughter-House cases, 16 Wall. 36, 57, that the 'privileges and immunities of citizens of the United States' mentioned and referred to in the Fourteenth Amendment, are only those privileges and immunities which were created by the Constitution of the United States and grew out of it, or out of laws passed in pursuance of it. I then held, and still hold, that the phrase has a broader meaning; that it includes those fundamental privileges and immunities which belong essentially to the citizens of every free government, among which Mr. Justice Washington enumerates the right of protection; the right to pursue and obtain happiness and safety."

111 U. S. 764, 746, 762.

Mr. Justice brown in his opinion in the case of *Lawton v. Steele*, states that:

"To justify the state in interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and *not unduly oppressive upon individuals.* The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with

private business, or impose unusual and unnecessary restrictions upon lawful occupations."
152 U. S. 133, 136.

The court in *Scott v. McNeal*, says:

"The prohibitions (setting forth those contained in the 14th Amendment) extend to all acts of the state, whether through its legislative, its executive, or its judicial authorities. Citing *Virginia v. Rives*, 100 U. S. 313, 318; *Ex Parte Virginia*, 100 U. S. 339, 346; *Neal v. Delaware*, 103 U. S. 370, 397."
154 U. S. 34.

In similar view the court in the case of *Nashville, etc. Ry. v. Taylor*, holds that:

"State action to which the prohibitions of the 14th Amendment to the Constitution of the United States extend, is not limited to a legislative enactment as it comes from the hands of the legislature, but extends to all instrumentalities and agencies officially employed in the execution of the law down to the point where the personal and property rights of the citizens are touched."
86 Fed. 168, 184.

In the case of *Allgeyer v. Louisiana*, it was held that:

"The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to

enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."

165 U. S. 589.

The court in *Hodgson v. Vermont*, said:

"We concede the proposition, so earnestly urged on behalf of the plaintiff in error, that by the Fourteenth Amendment it is made the right and the consequent duty of this court, when a case has been duly brought before it, to inquire whether, in the enactment and administration of the criminal laws of a state, it is sought to arbitrarily deprive any person of his life, liberty or property, or to refuse him the equal protection of the laws, and that such inquiry is not precluded or ended by the mere fact that the judgment complained of was reached by proceedings in a state court in pursuance of the provisions of a state statute."

168 U. S. 272.

In the case of *Chicago, Burlington, etc. R. R. v. Chicago*, the court said:

"But a state may not, by any of its agencies, disregard the prohibitions of the Fourteenth Amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment. In determining what is due process of law regard must be had to substance, not to form. This court referring to the Fourteenth Amendment, has said: 'Can a state make anything due process of law which, by its own legislation, it chooses to declare such?' To af-

firm this is to hold that the prohibition to the states is of no avail, or has no application where the invasion of private rights is effected under the forms of state legislation."

166 U. S. 234, 235.

In the case of *Gulf, Colorado, etc. Railway v. Hefley,* the court said:

"The question is not whether, in any particular case, operation may be given to both statutes, but whether their enforcement may expose a party to a conflict of duties. It is enough that the two statutes operating upon the same subject-matter prescribe different rules. In such case one must yield, and that one is the state law."

158 U. S. 98, 103.

In the case of *Reid v. Colorado,* the court said:

"It is quite true, as urged on behalf of the defendant, that the transportation of live stock from state to state is a branch of interstate commerce and that any specified rule or regulation in respect of such transportation, which congress may lawfully prescribe or authorize and which may properly be deemed a regulation of such commerce, is paramount throughout the Union. So that when the entire subject of the transportation of live stock from one state to another is taken under direct national supervision and a system devised by which diseased stock may be excluded from interstate commerce, all local or state regulations in respect of such matters and covering the same ground will cease to have any force, whether formally abrogated or not; and such rules and regulations as congress may lawfully prescribe or authorize will alone control. *Gibbons v. Ogden,* 9 Wheat. 1, 210; *Morgan v. Louisiana,* 118 U. S. 455, 464; *Hennington v.*

Georgia, 163 U. S. 299, 317; *N. Y., N. H. & H. R. R. Co. v. New York,* 165 U. S. 628, 631; *Missouri, Kansas & Texas Railway Co. v. Haber,* 169 U. S. 613, 626; *Rasmussen and Idaho,* 181 U. S. 198, 200. The power which the states might thus exercise may in this way be suspended until national control is abandoned and the subject be thereby left under the police power of the states."

187 U. S. 146, 147.

The court in the case of *Lockner v. New York,* referring to the extent to which the theory of the police power has been urged, said:

"It is also urged, pursuing the same line of argument, that it is to the interest of the state that its population should be strong and robust, and therefore any legislation which may be said to tend to make people healthy must be valid as health laws, enacted under the police power. If this be a valid argument and a justification for this kind of legislation it follows that the protection of the Federal Constitution from undue interference with liberty of person and freedom of contract is visionary, wherever the law is sought to be justified as a valid exercise of the police power. Scarcely any law but might find shelter under such assumptions, and conduct, properly so called, as well as contract, would come under the restrictive sway of the legislature. Not only the hours of employes, but the hours of employers, could be regulated, and doctors, lawyers, scientists, all professional men, as well as athletes and artisans, could be forbidden to fatigue their brains and bodies by prolonged hours of exercise, lest the fighting strength of the state be impaired. We mention these extreme cases because the contention is extreme. We do not

believe in the soundness of the views which uphold this law."

198 U. S. 60.

In the case of *State v. Peel Splint Coal Company,* the court held that:

"A man must have the right to exercise his skill and talents and dispose of and use his labor and property, and lawful pursuits as to him shall seem proper. The property right may be violated by prohibiting its full use to the owner as effectually as by taking it from him, his ownership being thus damaged."

36. W. Va. 856.

In the case of *State v. City of Sheridan,* the court in an exaustive opinion says:

"The right to follow any of the common occupations of life or to earn one's living in any innocent vocation without let or hindrance is one of those inalienable rights covered by the statements in the Declaration of Independence and secured to all those living under our form of government by the liberty, property, and happiness clauses of the national and state constitutions. 6 R. C. L., p. 266, and cases cited: *Butchers' Union Slaughter House Co. v. Crescent City Live Stock Co.,* 111 U. S. 746, 4 Sup. Ct. 652, 28 L. Ed. 585; *Tolliver v. Blizzard,* 143 Ky. 773, S. W. 509, 34 L. R. A. (N. S.) 890; *Bessette v. People,* 193 Ill. 334, 62 N. E. 215, 56 L. R. A. 558; 12 C. J. 921; *Commonwealth v. Beaulieu,* 213 Mass. 138, 99 N. E. 555, Ann. Cas. 1913E, 1080. In the case of *Butcher's Union Slaughter House Co. v Crescent City Live Stock Co., supra,* Justice Field, on page 757 of 111 U. S. on page 661 of 4 Sup. Ct., 28 L. Ed. 585, said:

'It has been well said that, the property

which every man has in his own labor, as it is the original foundation of all other property, so it is the most sacred and inviolable. The patrimony of the poor man lies in the strength and dexterity of his own hands, and to hinder his employing this strength and dexterity in what manner he thinks proper, without injury to his neighbor, is a plain violation of this most sacred property. It is a manifest encroachment upon the just liberty both of the workman and of those who might be disposed to employ him. As it hinders the one from working at what he thinks proper, so it hinders the others from employing whom they think proper.' Adam Smith's Wealth of Nations, bk. I, c. 10."

"It is not sufficient that the public sustains harm from a certain trade or employment as it is conducted by some engaged in it. Because many men engaged in the calling persist in so conducting the business that the public suffers and their acts cannot otherwise be effectually controlled is no justification for a law which prohibits an honest man from conducting the business in such a manner as not to inflict injury upon the public."

Tolliver v. Blizzard, supra.

"In order that a statute or ordinance may be sustained as an exercise of the police power, the courts must be able to see that the enactment has for its object the prevention of some offense or manifest evil or the preservation of the public health, safety, morals, or general welfare, that there is some clear, real, and substantial connection between the assumed purpose of the enactment and the actual provisions thereof." 12 C. J. 929; In Matter of Jacobs, 98 N. Y. 98, 50 Am. Rep. 636.

"The police power has been termed the 'law

of overwhelming necessity.' *Dunne v. People,* 94 Ill. 120, 34 Am. Rep. 213. And even where the matter under consideration has been held a proper subject for regulation, all regulations must be reasonable and only go so far as are reasonably necessary to effect the legitimate object of the public protection sought. 12 C. J. 934. There must be reasonable ground for the police interference and also the means adopted must be reasonably necessary for the accomplishment of the purpose in view. So in all cases where the interference affects property and goes beyond what is reasonable by way in interfering with private rights, it offends against the general equality clause of the Constitution; it offends against the spirit of the whole instrument." *Bonnett v. Vallier,* 136 Wis. 193, 202, 116 N. W. 885, 17 L. R. A. (N. S.) 486, 491, 128 AM St. Rep. 1061. 170 Pac. 3, 4.

The case of *Chenoweth v. State Board of Medical Examiners,* arose under a statute of the state of Colorado providing for the revocation of a physician's license in case he publishes or circulates an advertisement relative to any disease of the sexual organs and the court held that such a provision is in violation of the Fourteenth Amendment to the Constitution and held that:

"The expression in the constitution, 'life, liberty and the pursuit of happiness,' is general in character and includes many rights which are inherent and inalienable. Many of the rights referred to in this expression are included in the general guaranty of 'liberty.' The happiness here referred to may consist in many things or depend on many circumstances but unquestionably includes the right of the

citizen to follow his individual preference in the choice of occupation. *Black on Const. Law*, 404. For these reasons we must conclude that the provisions of the statute that a physician's license may be revoked for 'causing the publication and circulation of an advertisement relative to any disease of the sexual organs' is in violation of the Fourteenth Amendment to the Constitution and section 3, art. 2, of our own bill of rights:

The legislature has no power, under the guise of police regulations, to arbitrarily invade the personal rights and personal liberty of the individual citizen. Its determination upon this question is not final or conclusive. If it pass an act ostensibly in the exercise of the police power, but which in fact interferes unnecessarily with the personal liberty of the citizen, the courts have a right to examine the act and see whether it relates to the objects which the exercise of the police power is designed to secure and whether it is appropriate for the promotion of such objects. When the police power is invoked for the purpose of regulating a useful business or occupation and the mode in which that business may be carried on or advertised, the legislature is not the exclusive judge as to what is a reasonable and just restraint upon the constitutional right of the citizen to pursue his calling and to exercise his own judgment as to the manner of conducting it. The general right of every person to pursue any calling, and to do so in his own way, provided that he does not encroach upon the rights of others, cannot be taken away from him by legislative enactment. *Tiedman on Lim. of Police Power*, #3; In *re Jacobs*, 98 N. Y. 108 (50 Am. Rep. 636); *People v. Gillison, supra* (109 N. Y. 389, 17 N. E. 343, 4 Am. St. Rep. 465); *Cooley on Const. Lim.* (6th Ed.)

pp. 606, 607, 744; *Ex parte Whitwell*, 98 Cal. 73, 32 Pac. 872 (19 L. R. A. 727, 35 Am. St. Rep. 152); *Frorer v. People, supra* (141 Ill. 171, 21 N. E. 395, 16 L. R. A. 492); *Town of Lake View v. Rose Hill Cemetery Co.*, 70 Ill. 191 (22 Am. Rep. 71); *Ritchie v. People, supra. Ruhstrat v. People*, 185 Ill. 133, 57 N. E. 41, 49 L. R. A. 181, 76 Am. St. Rep. 30."

57 Colo. 74; 141 Pac. 134.

The trial court in interpreting Section 2 of Chapter 260 of Laws 1915, stated:

> "He may prescribe the drug if in good faith he deems it necessary for the cure of the habit, and very likely he may lawfully in an emergency or while the patient is under control administer it in person or by an assistant, if in good faith he deems it necessary as a measure of cure."

Here we are told that "prescribe" does not mean written order to a pharmacist alone but may include administering the drug to the addict by the physician or his assistant from the stock on hand in the possession of said physician. On the other hand if the physician handed the same amount of the drug to the addict and permitted the addict to administer the drug himself it is a violation of this provision of the law. Even were the provisions of section 2 not in conflict with the provisions of the Harrison Narcotic Act it would still be void as impairing the rights of citizens as guaranteed by Section One of the Fourteenth Amendment to the Constitution of the United States. On the one hand the provision is so uncertain as to just how a physician may treat an addict in an attempt to effect a

cure, for while it is clear that he may write a prescription to a druggist the court says that he may also administer to the addict in an emergency, but who is to determine whether there is an emergency, the physician, the addict or the court? Again it may be administered by the physician or an assistant, who may or may not be a physician, if the addict is under control. By this interpretation we are told that we may learn whether a physician has violated this provision of the law after he is brought into court and his particular act subjected to the scrutiny of the court to determine whether his treatment comes within the prescription. This provision leaves a large borderland where a treatment might be either a crime or an act of humanity within the discretion of the court.

On the other hand this provision cannot be urged as a *bona fide* exercise of the police power, since it would be to the public interest as well as for the best interest of the addict to effect a cure for his drug habit, and to prevent the spread of drug addiction as well. By handing an addict a written order for narcotic drugs and especially for a reduced amount each day a temptation is placed before him to raise the amount upon the prescription so that he might be able to have his customary amount, so that in many cases the purpose of the act would be frustrated, and in any event the provision of this section does not make for the public health and welfare to the extent that the Harrison Act does, yet by its limitation upon the right of a physician to practice his profession in accordance

with the accepted methods of the profession it interferes with his right as a citizen. This interference with the right to practice the profession of medicine is an arbitrary act on the part of the state without justification in that the act forbidden does not affect the public welfare in any manner different from that of acts permitted.

Because of the reasons herein set forth I respectfully urge upon your Honors that said judgment of the Supreme Court of Minnesota be reversed and that said Supreme Court of Minnesota be ordered to enter a judgment reversing the order of the lower court on said cause.

Respectfully submitted,

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JAMES D. MAHER,
CLERK

27431.

Supreme Court of the United States.

OCTOBER TERM, 1920.

No. 224.

THE STATE OF MINNESOTA ON THE RELATION OF C. D. WHIPPLE,

Plaintiff in Error,

v.

OSCAR MARTINSON, SHERIFF OF HENNEPIN COUNTY, MINNESOTA.

In error to the Supreme Court of the State of Minnesota.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

CLIFFORD L. HILTON,
Attorney General,
JAMES E. MARKHAM,
Assistant Attorney General,
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STATEMENT OF THE CASE.

The defendant, plaintiff in error, was indicted for a violation of a statute enacted by the legislature of the state of Minnesota, approved April

23, 1915, entitled: "An act to provide against the evils resulting from the traffic of certain habit forming narcotic drugs, and to regulate the sale and the having in possession of such drugs and repealing all acts, or parts of acts inconsistent herewith and providing penalties for the violation thereof." The act is printed at length as an addenda to this brief for the information of the court. The indictment is set out at length in the brief of counsel for the plaintiff in error and need not be reproduced here.

Upon trial in the district court of Hennepin county in the state of Minnesota, the defendant was convicted of the offense charged in the indictment and as punishment for the offense was sentenced to imprisonment in the state prison. From the judgment of conviction he appealed to the supreme court of the state, where the judgment was affirmed.

State v. Whipple, 143 Minn. 403.

Upon remand of the cause to the trial court a warrant of commitment was issued to the sheriff of Hennepin county (5), and the defendant who was in the custody of the sheriff under such commitment applied to the court in which he was convicted for a writ of habeas corpus praying for his release from custody, upon the asserted ground that the statute for a violation of which he was so convicted, as stated in his petition, "is unconstitutional and void because in violation of the constitution of the United States and in conflict with

the act of congress known as the Harrison Narcotic Drug Law, approved December 17, 1914." (2). A writ was issued requiring the sheriff to bring the relator, the plaintiff in error, before the court on October 27, 1919, together with the time and cause of his imprisonment and detention, then to do and receive what should there be considered concerning such detention. The sheriff in obedience to the writ produced the relator before the court, returning that he held him pursuant to the warrant of commitment herein referred to, and the cause proceeded to hearing, resulting in an order discharging the writ and remanding the relator to the custody of the sheriff. (6) Upon appeal to the supreme court of the state the judgment of the district court was affirmed and by the judgment of that court the writ of habeas corpus was discharged, but a stay was allowed and the relator was admitted to bail to enable him to take such further proceedings in the premises as he might be advised. (7)

State ex rel. Whipple v. Martinson, 144 Minn. 206.

Thereupon the relator filed his petition for the allowance of a writ of error for review of the judgment by this court. (10-14) The writ was issued upon the allowance thereof by the chief justice of the supreme court of Minnesota (15), and thus the cause is brought before this court for review.

ARGUMENT.

The court below in disposing of this case well states the contention of the plaintiff in error as this: That the paramount right of legislation upon the subject matter of the statute relating to the sale of narcotic drugs rests with congress; that in the exercise of that right congress enacted the so-called Harrison act of December 17, 1914, regulating the importation, manufacture and sale of narcotic drugs; that the state statute, in so far as it conflicts with the terms and provisions of the act of congress is unconstitutional, inoperative and void; that inasmuch as the congressional statute permits the doing of the act which the state statute condemns, the state statute is void and hence that his imprisonment by reason of a judgment of conviction resting upon a void statute is unlawful, and accordingly that he is entitled to be released therefrom upon habeas corpus.

The state court did not pass upon the contention otherwise than to hold that there is no conflict in the two statutes. The court said:

> "Conceding without considering or deciding the point which we think of doubtful merit, that the right of legislation upon the subject in hand is paramount in the federal congress, and that the state statute is void in so far as it conflicts with the act of congress, we are unable after careful examination and comparison of the two statutes, to discover any conflict in

> the respect here claimed. It would serve no useful purpose to attempt to analyze the respective enactments and we are content with announcing the conclusion stated without further comment."

The indictment charges the sale by the plaintiff in error to one Chandler, an habitual drug addict, of six grains of morphine for his personal use. The record before this court is silent as to the proceedings had upon the trial of the indictment, but it does appear from the statement contained in the decision of the court below (143 Minn. 404) that the evidence presented in support of the charge was that this sale to Chandler and the sales to the other drug addicts who testified on the trial were made without any pretense of professional treatment; that the quantity sold and delivered to the addict was regulated only by his ability to pay for it, thus disclosing a flagrant violation of the statute and a flagrant and sordid prostitution of professional privilege.

The statute makes it unlawful for a physician or dentist to furnish to or prescribe morphine for the use of an habitual user, but permits the physician to *prescribe* in good faith for the use of a patient under his care for the treatment of a drug habit such substance as he may deem necessary for such treatment. This provision was properly construed to prohibit the furnishing of morphine to a drug addict otherwise than upon a physician's prescription issued in pursuance of the regulations contained in other parts of the statute.

It is claimed that the state statute as thus construed prohibits that which the federal statute permits, and hence as we understand the contention, the inhibition in the state law denies a privilege guaranteed by the federal law and is therefore unauthorized and void. We submit that the contention is palpably without merit. The right of the state in the exercise of its police power to adopt laws restricting or forbidding the sale of harmful substances, such as intoxicating liquor and habit forming narcotic drugs, has been so repeatedly affirmed by the decisions of this court that reference thereto seems unnecessary. The federal act (38 Stat. 785), containing regulations and restrictions upon the sale of narcotic drugs, was sustained only because it was declared to be a tax measure not unreasonably interfering with the reserved police power of the states.

United States v. Doremus, 249 U. S. 86.

This court has declared that,

> "It should never be held that congress intends to supersede or by its legislation suspend the exercise of the police powers of the states, even when it may do so, unless its purpose to effect that result is clearly manifested. This court has said—and the principle has been often reaffirmed—that in the application of this prinicple of supremacy of an act of congress in a case where the state law is but the exercise of a reserved power, the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together."

Reid v. Colorado, 187 U. S. 148.

The court also has declared that when the local police regulation has real relation to the suitable protection of the people of the state and is reasonable in its requirements, it is not invalid because it may incidentally affect congressional legislation.

Plumley v. Massachusetts, 155 U. S. 461.

> "Where the subject is of wide importance to the community, the consequences of fraudulent practices generally injurious and the suppression of such fraud matter of public concern, it is within the protective power of the state to intervene."
>
> Patapsco v. North Carolina, 171 U. S. 345.

Where an act of congress relating to the subject on which the state may act also limits its prohibitions, it leaves the subject open to state regulation as to prohibitions which are unenumerated. Even as to a subject upon which the congress has the exclusive power to legislate, when it does act, the intent to supersede the exercise by the state of its police power as to matters not covered by the congressional legislation is not to be inferred. Such intent is not to be implied unless the act of congress fairly interpreted is in actual conflict with the law of the state.

Savage v. Jones, 225 U. S. 501.

Where legislation is adopted by parmount authority providing a general system for the regulation of the business of selling an article, the unrestricted sale of which may injuriously affect the

public morals, a standard of regulation is thus established below which standard prescribed the subordinate authority may not fall, but it does not deprive the subordinate authority of the right to provide for such supplemental and additional regulations as may be required by local conditions.

Evans v. Redwood Falls, 103 Minn. 314.

The state court, as its decision indicates, finds no conflict between the requirements of the state law, and those of the act of congress, and even if the provisions and regulations contained in the act of congress are to be treated as paramount to those of the state law, the state statute should nevertheless be sustained as not in conflict with the act of congress.

We respectfully submit that in any aspect of the case the decision of the state court refusing to discharge the plaintiff in error from custody, pursuant to the judgment of conviction, should be sustained.

For the defendant in error:

CLIFFORD L. HILTON,
Attorney General,
JAMES E. MARKHAM,
Assistant Attorney General,
State of Minnesota.

ADDENDA.

Chapter 260, Laws Minnesota 1915.

An Act to provide against the evils resulting from the traffic of certain habit forming narcotic drugs, and to regulate the sale and the having in possession of such drugs and repealing all acts, or parts of acts inconsistent herewith and providing penalties for the violation thereof.

Be it enacted by the Legislature of the State of Minnesota:

Section 1. Sale of certain narcotics prohibited after Dec. 31, 1915, except under certain conditions.—On or after the 31st day of December, 1915, it shall be unlawful for any person to possess or sell or otherwise dispose of any opium or preparation or manufacture thereof; any morphine or salt or ester or other derivative thereof; any heroin or salt or ester thereof; any coca leaves except decocanized coca leaves; any preparation or manufacture of coca leaves except decocanized preparations or manufactures; any cocaine or salt ester or other derivative thereof; any alpha—or beta—eucaine or salt ester thereof; or any chloral or any salt, or ester thereof; or any synthetic substitute for any of the aforementioned substances. Provided that nothing contained in this section shall apply:

(a) To the possession of any of the aforementioned substances by legally licensed physicians or

surgeons in connection with the practice of medicine or surgery, by legally licensed dentists in connection with the practice of dental medicine or surgery, by legally licensed veterinarians in connection with the practice of veterinary medicine or surgery, by legally licensed pharmacists or druggists in connection with the practice of pharmacy, by hospitals or similar institutions, when intended exclusively for the treatment of patients in said institutions, by manufacturers of any of the aforementioned substances, by wholesale dealers in any of the aforementioned substances, or by colleges, scientific or public institutions when intended inclusively for educational, scientific or public purposes.

(b) To the possession by common carriers of original packages of any of the aforementioned substances consigned to any of the persons enumerated in paragraph (a) of this section.

(c) To the possession by duly authorized officers of the law of any of the aforementioned substances seized in the performance of their official duties.

(d) To the possession by any person of any of the aforementioned substances which have been dispensed by a legally licensed physician, surgeon, dentist, veterinarian, pharmacist or druggist in compliance with this act, and are possessed in the form in which they are dispensed and in a container which is labeled in conformity with this act.

(e) To the possession by consumers, by common carriers or by retail dealers licensed by the board of pharmacy of bona fide medicinal preparations intended for internal use, which do not contain in one fluid ounce, or if a solid or a semi-solid preparation, in one avoirdupois ounce, separately more than two grains of opium or the extractive of two grains thereof, or more than one-fourth grains of morphine or any salt thereof, or more than one-eighth grain of heroin or any salt thereof, or more than one grain of codeine or any salt thereof, or 120 grains of chloral or any salt or ester thereof, or of any bona fide medicinal preparation suitable for external use only which does not contain cocaine or any salt or derivative thereof or any synthetic substitute therefor, or alpha—or beta—eucaine or any salt or derivative thereof or any synthetic substitute therefor, or heroin or any salt or derivative thereof.

(f) To the sale or other disposal of the aforementioned substances by manufacturers, wholesale dealers, legally licensed pharmacists or druggists to manufacturers, wholesale dealers, hospitals or similar institutions, colleges, scientific or public institutions, or legally licensed physicians, dentists, veterinarians, pharmacists or druggists; provided that a record of such sale or disposal, showing the date of the transaction, the names and addresses of the parties thereto, the name and quantity of the substance transferred, be made and kept on file by both parties to the transaction for two

years open to inspection by duly authorized officers of the law; provided that the making and preserving of any order and duplicate, or of any record required by any other law of this state or of the United States, which order, duplicate or record shall set forth the facts above required to be stated, shall be deemed a satisfactory compliance with the provisions of this paragraph. Whenever required to do so by the authorities charged with the duty of enforcing this act any person selling or distributing the aforementioned substances shall render to such authorities requesting it a true and correct statement verified by affidavit setting out the quantity of such drugs received by him during a period immediately preceding the request, not exceeding three months, as the authorities may demand, the names of the persons from whom the said drugs were received, the quantity in each instance received from each of such persons, and the date when received.

(g) To the sale or other disposal to a consumer of any of the aforementioned substances by a legally licensed pharmacist or druggist pursuant to the written prescription of a legally licensed physician, surgeon, or dentist, provided that said prescription is dated as of the day on which it was signed by the prescriber, bears the signature and address of the prescriber and the name of the person for whose use the said substances is intended; and provided that the said prescription be serially numbered and dated and filed in its

appropriate place in the prescription file of the compounder and be retained on file for two years open to inspection by any duly authorized officer of the law; and provided further that, with the exception of any prescription for a preparation which, if for internal use, does not contain in one fluid ounce, if a solid or semi-solid preparation, in one avoirdupois ounce separately more than two grains of opium or the extractive of two grains thereof, or more than one-fourth grain of morphine or any salt thereof, or more than one-eighth grain of heroin or any salt thereof, or more than one grain of codeine or any salt thereof, or 120 grains of chloral or any salt or ester thereof, or, if for external use, does not contain cocaine or any salt derivative thereof, or any synthetic substitute therefor, or alpha—or beta—eucaine, or any salt or derivative thereof or any synthetic substitute therefor, or heroin or any salt or derivative thereof; such prescription shall be filled but once and no copy of such prescription shall be given to any person except to a duly authorized officer of the law for use in connection with the enforcement of this act or laws of the United States; and provided further that the medicine dispensed upon such prescription shall be delivered in a container which is labeled with the serial number of the prescription, the date upon which it is filled, the name of the person for whose use the medicine is intended, the name of the prescriber, and the name and address of the dispenser.

(h) To the sale or other disposal of any of the aforementioned substances by a legally licensed pharmacist or druggist to a person authorized in writing by the prescriber to receive such substance on the written prescription of a legally licensed veterinarian; provided that such prescription is dated as of the day on which it was signed by the prescriber, bears the signature and address of the prescriber, the name of the person authorized to receive the medicine, and the kind of animal for whose use the said substance is intended; and provided that such prescription be identified, filed and preserved in the manner provided in the preceding paragraph; and provided further that with the exception of any prescription for a preparation for external use, which does not contain any cocaine or any salt or derivative thereof or any synthetic substitute therefor, or any alpha—or beta—eucaine or any salt or derivative thereof or any synthetic substitute therefor, or any heroin or any salt or derivative thereof, such prescription shall be filled but once and no copy of such prescription shall be given to any person except to a duly authorized officer of the law for use in connection with the enforcement of this act or the laws of the United States; and provided further that the medicine dispensed upon such prescription shall be delivered in a container which is labeled with the serial number of the prescription, the date upon which it is filled, the name of the person authorized by the prescriber to receive the medicine,

the kind of animal for whose use the medicine is intended, the name of the prescriber, and the name and address of the dispenser.

(i) To the administration, sale or other disposal of any of the aforementioned substances by a legally licensed physician or dentist for or to a patient upon whom he is in professional attendance, provided that said physician or dentist shall keep a record of the name and address of the patient, the date of the sale or other disposal, and the amount of the drug transferred; provided that the making and preserving of any record required by any other law of this state or of the United States, which record shall set forth the facts above required to be stated, shall be deemed satisfactory compliance with the provisions of this paragraph; and provided further that any of the aforementioned substances dispensed for the use of a patient by a legally licensed physician or dentist shall be delivered in a container labeled with the name of the patient, the date of the delivery, and the name and address of the dispenser.

(j) To the administration of any of the aforementioned substances to a lower animal and not to a human being by a legally licensed veterinarian, or to the prescribing, sale, or other disposal of the aforementioned substances for administration to a lower animal and not to a human being, by a legally licensed veterinarian; provided that said veterinarian when selling or delivering any of the aforementioned substances shall keep a rec-

ord of the name and address of the person to whom he delivers any of the aforementioned substances, the kind of animal for whose use the aforementioned substances are delivered, the date of the delivery and the amount of the drug transferred in such instances as he may deliver of any of the aforementioned substances more than two full adult medicinal doses for the kind of animal specified, and provided further that any of the aforementioned substances delivered by a legally licensed veterinarian shall be delivered in a container labeled with the name of the person to whom the delivery is made, the kind of animal for whose use the medicine is intended, the date of the delivery, and the name and address of the dispenser.

(k) To the sale by manufacturers, wholesale dealers, legally licensed pharmacists, druggists, physicians, surgeons, dentists or veterinarians or by retail dealers licensed by the board of pharmacy to sell bona fide medicinal preparations intended for internal use, which do not contain in one fluid ounce, or if a solid or semi-solid preparation, in one avoirdupois ounce, separately more than two grains of opium or the extractive of two grains thereof, or more than one-fourth grain of morphine or any salt thereof, or more than one-eighth grain of heroin or any salt thereof, or more than one grain codeine or any salt thereof, or 120 grains of chloral or salt or ester thereof, or of any bona fide medicinal preparation suitable for external use only, which does not contain cocaine or

any salt or derivative thereof or any synthetic substitute therefor, or alpha—or beta—eucaine or any salt or derivative thereof or any synthetic substitute therefor, or heroin or any salt or derivative thereof.

Sec. 2. Physicians and dentists not to prescribe for habitual users.—It shall be unlawful for any physician or dentist to furnish to or prescribe for the use of any habitual user of the same any of the substances enumerated in Section 1 of this act; provided that the provisions of this section shall not be construed to prevent any legally licensed physician from prescribing in good faith for the use of any patient under his care for the treatment of a drug habit such substances as he may deem necessary for such treatment; provided that such prescriptions are given in good faith for the treatment of such habit.

Sec. 3. Penalty for violation.—Any person who violates the foregoing provisions of this act shall be deemed guilty of a felony and for each violation thereof shall be punished on conviction thereof, by imprisonment in the penitentiary for not less than one year nor more than five years, or by a fine of not less than $100.00 nor more than $1,000.00, or both imprisonment and fine in the discretion of the court; provided, however, that a legally licensed pharmacist or druggist shall not be held liable for the innocent compounding and dispensing of any of the articles enumerated in Section 1 of this act, in consequence of a false, fraudulent or forged

prescription which he in good faith believed to be a prescription of a licensed physician, licensed dentist or licensed veterinarian issued for a lawful purpose.

Sec. 4. Licenses to be revoked on second conviction.—Whenever any legally licensed physician, surgeon, dentist, veterinarian, pharmacist, druggist, manufacturer, wholesale or retail dealer or institution, shall have been twice convicted in a court of proper jurisdiction of any felony under this act, the officer or board, having power to issue licenses to any such licensed person, may, after giving such licensee reasonable notice and opportunity to be heard, revoke the license of said licensee.

Sec. 5. Construction of term.—The word "person" as used in this act shall be construed to mean and include a partnership, association, company or corporation, as well as a natural person.

Sec. 6. Inconsistent acts repealed.—All acts and parts of acts inconsistent with this act are hereby repealed.

Sec. 7. Effective Dec. 31, 1915.—This act shall take effect and be in force from and after December 31st, 1915.

Approved April 23, 1915.

Chapter 208, *Laws Minnesota* 1919.

An Act to amend Section 2, *Chapter* 260, *Laws* 1915, *relating to the prescription by physicians, surgeons, and dentists of certain narcotics, for habitual users of the same so as to prohibit such prescriptions.*

Be it enacted by the Legislature of the State of Minnesota:

Section 1. Certain narcotics prohibited.—That section 2, chapter 260 of Laws 1915, be amended so as to read as follows:

Section 2. It shall be unlawful for any physician, surgeon or dentist to furnish to, or prescribe for, the use of any habitual user of the same any of the substances enumerated in section 1, chapter 260, Laws 1915, unless such physician, surgeon or dentist can show that it is necessary to furnish or prescribe the same to such user in order to save his life.

Approved April 10, 1919.